89-1923

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO and CHARLES J. HUTTINGER,

Petitioners,

v.

FRANK LANDRY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether RICO and state law rather than federal law can govern a challenge to union and employer conduct in collective bargaining and related to a retirement plan simply because a plaintiff alleges that conduct subject to the duty of fair representation and ERISA violates RICO?

2. Whether the threat of continuing racketeering activity may be established by the unsubstantiated allegations of different plaintiffs in a different RICO complaint against the same defendant, and by one defendant's continuing receipt of benefits allegedly derived from a RICO scheme which "briefly flourished and faded" years before?

3. Whether ERISA fiduciary obligations can be imposed before an ERISA plan has been "established" merely because the plan includes a retroactive effective date?

LIST OF PARTIES TO THE PROCEEDINGS

The Air Line Pilots Association, International, AFL-CIO and Charles J. Huttinger were defendants in the district court, appellees in the court of appeals and are petitioners in this Court.

TACA International Airlines, S.A. was a defendant in the district court, an appellee in the court of appeals and is a respondent in this Court.

Fringe Benefit Administrators, Ltd. was a defendant in the district court, an intervenor in the court of appeals and is a respondent in this Court.

The plaintiffs in the district court, appellants in the court of appeals and respondents in this Court, are: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, T.Q. Howard, Joe Hass, Walter Keller, Don Jenkins, Emile Cerisier, and M. Letona. The following were plaintiffs in the district court but were not appellants in the court of appeals and are not respondents in this Court: Thomas Brignac, Robert Lukenbill, Bert Haffner, and Gary Zyriek.

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FRANK LANDRY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Air Line Pilots Association, International and Charles J. Huttinger petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment in *Landry, et al.* v. *Air Line Pilots Ass'n, Int'l., et al.*, No. 88-3363 (5th Cir. Jan. 31, 1990), *modified*, April 27, 1990.

OPINIONS BELOW

The opinion of the court of appeals, which has not yet been officially reported, is reproduced at App. A.[1] The unreported opinions of the court of appeals on petitions for rehearing are reproduced at App. H and App. I. The unreported opinions of the United States District Court for the Eastern District of Louisiana are reproduced at App. C through App. E.

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[1] "App. ——" refers to the appendix annexed to this petition. "R. ——" refers to the record on appeal.

JURISDICTION

The opinion and judgment of the court of appeals were entered on January 31, 1990. Timely petitions for rehearing were granted in part and denied in part on April 27, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Set out in App. J are the relevant portions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, the Internal Revenue Code, 26 U.S.C. § 1 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and of the following RICO predicate act statutes: 18 U.S.C. § 664, 18 U.S.C. § 1341, 18 U.S.C. § 1343, 18 U.S.C. § 1951, 29 U.S.C. § 186 and 29 U.S.C. § 501(c).

STATEMENT OF THE CASE

The underlying dispute grows out of negotiations between TACA International Airlines, S.A. ("TACA"), an air carrier incorporated in El Salvador, and the Air Line Pilots Association, International ("ALPA"), the bargaining representative of TACA's pilots. Those negotiations resulted in a collective bargaining agreement which, *inter alia*, permitted TACA to relocate its pilot base from New Orleans to El Salvador. Plaintiffs below, former TACA pilots, contend that TACA and ALPA negotiated the collective bargaining agreement to further their own needs at plaintiffs' expense. The original complaint was cast as a typical "hybrid" labor law claim, charging that ALPA breached its duty of fair representation ("DFR") and that TACA breached the pre-existing collective bargaining agreement in violation of the RLA. Plaintiffs also asserted that ALPA, TACA and Fringe Benefit Administrators, Ltd. ("FBA"), the plan administrator for the TACA pilots' retirement plan (the "Plan"), breached

fiduciary duties under ERISA in the implementation and administration of the Plan. In an amended complaint, plaintiffs repackaged these claims as RICO violations committed by TACA, ALPA and Charles J. Huttinger ("Huttinger"), an ALPA representative at TACA.[2]

The Facts

In October 1983, TACA and ALPA commenced negotiations to amend their existing collective bargaining agreement. Shortly thereafter, TACA attempted to relocate its pilot base, terminate the existing agreement, and withdraw its recognition of ALPA. App. A, 3a. ALPA filed suit under the RLA. On ALPA's motion, the district court enjoined TACA's conduct, *id.*, as it had similar TACA actions years before. *See Ruby* v. *TACA Int'l Airlines, S.A.*, 439 F.2d 1359 (5th Cir. 1971). The Fifth Circuit affirmed, but held that TACA could "relocate its pilot base and effect the other intended steps" provided that it did so in accordance with the RLA's bargaining requirements. *Air Line Pilots Ass'n, Int'l* v. *TACA Int'l Airlines, S.A.*, 748 F.2d 965, 972 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

Negotiations continued in 1984 and 1985, assisted by the National Mediation Board, culminating in a July 24, 1985 "Pilots' Agreement." ALPA agreed not to oppose relocation of the pilot base to El Salvador after August 31, 1985. In return, TACA agreed that its pilots could elect either to relocate or accept a specified severance package. The Pilots' Agreement further provided that TACA's obligation to fund the Plan would cease as of August 31, 1985, which, by the Plan's terms, would cause

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[2] Plaintiffs also invoked the District Court's jurisdiction under 28 U.S.C. §§ 1331, 1332 and 1337, the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, and Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186.

it to terminate. R.503-05.[3] A December 17, 1985 "Settlement Agreement" between TACA and ALPA resolved all disputes which had arisen under the Pilots' Agreement.

Proceedings Below

i. ***District Court***

A year after the Pilots' Agreement was reached, 15 former TACA pilots, 14 of whom had accepted the severance option and thereby received over $400,000, App. A, 5a; R.68, 576, filed suit, complaining that the Pilots' Agreement had been negotiated in breach of ALPA's DFR and of the pre-existing collective bargaining agreement. Specifically, plaintiffs claimed that the Pilots' Agreement was the "result of collusion" in negotiations between TACA, ALPA and Huttinger in the following respects: (1) TACA agreed to pay Huttinger undeserved severance and other benefits and not to sue ALPA for acts of sabotage against TACA aircraft in order to secure ALPA's consent to the pilot base relocation; (2) ALPA additionally consented to the Pilots' Agreement to avoid continued representation of the small, costly TACA bargaining unit; and (3) the TACA pilots were promised but then denied an opportunity to ratify the Pilots' Agreement. Plaintiffs further alleged that TACA, ALPA and FBA violated ERISA by delaying implementation of the Plan until 1985, failing and refusing to disclose information about the Plan, and paying Plan benefits to Huttinger, but not to plaintiffs.

ALPA and TACA filed motions to dismiss or, alternatively, for summary judgment, contending that the DFR/breach of contract claim was barred by the statute of limitations and that plaintiffs had failed to state a viable ERISA claim. App. A, 7a.

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[3] In 1982, TACA, pursuant to a February 24, 1982 ALPA-TACA Letter of Agreement, commenced funding of a future retirement plan. The Plan was not established until April 18, 1985. R.508.

Plaintiffs attempted to side-step the limitations bar in two ways. First, they sought to have TACA found in contempt of the 1983 injunction against relocation of the pilot base. This effort was rejected by the district court in *Landry* and by the judge who issued the 1983 injunction. App. A, 7a. Plaintiffs then amended their complaint for the express purpose of avoiding the limitations bar to their labor law claim. R. 467. The same activities earlier asserted to have violated the RLA and ERISA were repackaged as a RICO claim against ALPA, TACA and Huttinger, with plaintiffs seeking nearly $100 million in damages. Plaintiffs claimed that purported mailings by TACA, ALPA and Huttinger concerning the negotiations and the Pilots' Agreement constituted mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343,[4] and that the provision of pension and severance benefits to Huttinger constituted bribery or conversion under 29 U.S.C. § 186 and 18 U.S.C. § 664.

In April 1987, the district court dismissed the DFR/breach of contract claim as time-barred. The ERISA claim was dismissed as against TACA and ALPA because plaintiffs had failed to demonstrate that these defendants were fiduciaries with respect to the matters of which plaintiffs complained.

Thereafter, defendants moved to dismiss or, alternatively, for summary judgment as to the RICO claim. App. A, 8a. Initially, the court denied the motions without prejudice and ordered plaintiffs to file a RICO Case Statement, *id.*, detailing their claim.[5] Defendants renewed their motions once that Statement was filed. *Id.*

By motion for reconsideration, plaintiffs then sought to resurrect their dismissed DFR/breach of contract

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[4] The mail and wire fraud allegations are hereafter treated together as "mail fraud."

[5] While plaintiffs did not further amend their complaint, the RICO Case Statement added "extortion" as a RICO predicate act.

cliam, *id.*, contending that the court had "overlooked the doctrine of equitable tolling." *Id.* The court found this assertion to be "entirely without merit," App. D, 86a, and as indicative of the "constantly evolving nature of plaintiffs' claims." R.1118.

Shortly thereafter, the district court dismissed the RICO claim, App. C, concluding that plaintiffs had failed to establish the existence of either a RICO enterprise or RICO predicate offenses. The court additionally noted "the significant possibility" that plaintiffs' mail and wire fraud claims were preempted by federal labor law, but found it unnecessary to reach this question. App. C, 84a n.5. While the court felt constrained to follow then-existing Fifth Circuit precedent on the RICO "pattern" element, App. C, 81a (subsequently repudiated by this Court), it found that the alleged racketeering scheme lacked the requisite "continuity" for a viable RICO claim, as all alleged acts were directed at a single, short-lived goal—relocation of the TACA pilot base—which was achieved long before plaintiffs filed suit. App. C, 84a. Eleven of the fifteen plaintiffs appealed. App. A, 9a.

ii. ***Court of Appeals***

The court of appeals affirmed dismissal of the DFR/breach of contract claim on limitations grounds. The court found no basis for equitable tolling, as plaintiffs were "on inquiry notice of the labor law claims they raised in this suit in the spring or summer of 1985." App. A, 15a.

With respect to the RICO claim, the court affirmed the dismissal of TACA but reversed as to ALPA and Huttinger. The court found that, even though the alleged RICO conspiracy "briefly flourished and faded" in 1985, App. A, 59a-60a, a factual dispute existed over the "continuity" element as to ALPA and Huttinger. The court held that these defendants may "pose[]a threat of continuing harm" based on two considerations:

(1) that certain pilots employed by Continental Airlines had filed a separate lawsuit against ALPA making "much the same allegations as the TACA pilots," App. A, 43a, and (2) that Huttinger continued to receive retirement benefits, for which ALPA could be vicariously liable under 18 U.S.C. § 1962(b). App. A, 43a.[6] The court ignored the fact that the Continental pilots' suit had already been dismissed and did not attempt to explain how ALPA but not TACA could be held liable for Huttinger's receipt of retirement benefits when TACA was as much a part of the alleged conspiracy as ALPA. App. A, 33a, 50a-51a. The court further held that the suit could proceed with ALPA as the RICO enterprise.

With respect to the asserted predicate acts on which plaintiffs relied, the court affirmed that plaintiffs could not state a claim under 18 U.S.C. § 1951 or 29 U.S.C. § 186. App. A, 44a-47a. The court held that plaintiffs' RICO claim could proceed on the basis of mail fraud grounded on the state common law of fraud, App. A, 50a n.87 (even though all the asserted racketeering acts either related to the Plan, or, as the court found, "occurred or commenced during or grew out of" the bargaining process, App. A, 58a), because the asserted mailings conceivably contained misrepresentations that "may have initially lulled the pilots into inaction." App. A, 51a.[7] The court further held that, because defendants had not demonstrated an absence of breach by Huttinger of any fiduciary duties under ERISA or 29 U.S.C. § 501(a), his receipt of retirement benefits could serve as the basis for

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[6] The court held that ALPA could not be both an enterprise and defendant under § 1962(c), and could not be held vicariously liable for a § 1962(c) violation. App. A, 42a.

[7] The court did not suggest that this possible consequence of the mailings could be squared with its finding that plaintiffs were contemporaneously aware of the alleged fraud, App. A, 14a-16a, or with plaintiffs' concession that the alleged fraud played no part in their decision to accept the severance option. R.702, 773.

a violation of 18 U.S.C. § 664, App. A, 56a; *see also* App. H, 104a-105a, although there was no showing that the payment of such benefits was inconsistent with the Plan or applicable law. *See* App. A, 55a.

The court also reversed the grant of summary judgment on the ERISA claim. While acknowledging that under existing case law no retirement plan was "established" for ERISA purposes until April 1985, App. A, 20a n.32, the court nevertheless determined that ERISA applied to the plan as of February 1, 1982, solely because that was the retroactive "effective date" specified in the April 1985 Plan document. App. A, 22a-23a. Although plaintiffs had alleged no breach of ERISA by Huttinger, the court found that Huttinger owed plaintiffs certain disclosure and fiduciary duties under ERISA, App. A, 29a, and that a genuine issue of material fact existed as to whether TACA and ALPA owed (and, if so, breached) any ERISA fiduciary duties, App. A, 25a, including "which party had the responsibility to implement the Plan" after February 1982. App. A, 28a. The court also found that a material issue of fact existed as to whether TACA and ALPA colluded with Huttinger to wrongfully provide him with retirement benefits. App. A, 33a.

In response to a petition for rehearing by ALPA and Huttinger, the court converted its determinations as to the effective date of the Plan and as to Huttinger's duty of disclosure, into disputed issues of fact. App. H, 104a. The court "neither approve[d] nor disapprove[d]" petitioners' contention that reliance on state fraud law as a source of substantive law for the mail fraud claim was federally preempted. App. H, 105a. In all other respects the court refused to modify its earlier decision. *Id.*

REASONS FOR GRANTING THE WRIT

This case presents three issues of great importance which merit this Court's review.

First, there is the fundamental issue of whether employees can use state law, through a RICO claim, to challenge an agreement which their employer and union have reached through collective bargaining. The Fifth Circuit permitted plaintiffs to accomplish just that result by simply converting their original hybrid DFR/breach of contract claim into a mail fraud claim under civil RICO. The lower court's decision subverts the basic substantive standards, remedies and procedures applicable to the duty of fair representation which this Court has carefully crafted in furtherance of federal labor policy. The decision below fundamentally undermines established federal labor law, ignores basic principles of federal preemption, and subjects union conduct governed by the duty of fair representation or related to retirement plans to state regulation, expansive vicarious liability concepts, and massive, non-remedial damages. The lower court compounded its error, and further undermined federal labor policy, by extending RICO predicate statutes to conduct that Congress never intended to criminalize. In so doing, the decision below failed to follow this Court's admonition that criminal statutes must be strictly construed.

Second, the decision below converts the "continuity" element of RICO into a meaningless formality by holding that a RICO defendant may "pose a continuing threat" of racketeering activity merely if it has been named as a defendant by other plaintiffs in a different RICO lawsuit. In this regard, the lower court's analysis is also flatly inconsistent with this Court's decisions as to the evidentiary showing required in opposing summary judgment motions. The only other basis for the Fifth Circuit's "continuity" holding—one defendant's current receipt of the alleged proceeds of a long-terminated racketeering scheme—converts any finite scheme involv-

ing asserted economic crimes into "continuing" racketeering activity. The lower court's treatment of RICO's continuity element places it in direct conflict with decisions of this Court and other circuits.

Third, until the decision below, the lower courts were uniformly in agreement than an ERISA plan is not "established," and ERISA fiduciary obligations do not begin to attach, until, *inter alia*, it can be determined what benefits will be provided under the plan and the procedures by which they can be obtained. The court below, in direct conflict with these authorities, suggests that where parties include a retroactive effective date in a plan, as the tax law encourages, they may thereby incur an ERISA fiduciary liability prior to establishment of a plan. If this ruling is permitted to stand, it will greatly discourage funding of retirement plans prior to their "establishment" and inflict serious adverse consequences on the very persons ERISA is designed to benefit—plan participants and beneficiaries.

In light of the foregoing, review by this Court is warranted.

I. THE APPLICATION OF RICO, STATE COMMON LAW AND EXPANDED CRIMINAL SANCTIONS TO UNION CONDUCT IN COLLECTIVE BARGAINING AND RELATED TO RETIREMENT PLANS DIRECTLY CONFLICTS WITH FUNDAMENTAL FEDERAL LABOR LAW POLICY AND DECISIONS OF THIS COURT AND OTHER CIRCUITS AND PRESENTS AN ISSUE OF COMPELLING IMPORTANCE WARRANTING THIS COURT'S REVIEW

A. Application of State Common Law Standards And Vicarious Liability Doctrine To Union Collective Bargaining Conduct

The overriding objective of the RLA is to resolve labor disputes without disrupting interstate commerce. *See Detroit & T.S.L.R.R.* v. *United Transp. Union*, 396 U.S.

142, 148 (1969). Because collective bargaining is the primary vehicle for achieving this goal, the duty imposed on carriers and labor unions by Section 2 First, 45 U.S.C. § 152 First, "to exert every reasonable effort to make and maintain [collective bargaining] agreements," is "central to the effective working of the Railway Labor Act." *Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 578 (1971). *Accord Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

Congress has determined that labor disputes are best resolved by requiring that management deal with a single, exclusive representative, chosen by a majority of the employees in a bargaining unit, on matters relating to terms and conditions of employment. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). *See Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 62, 67-68 (1975); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 760 (1961); *Steele* v. *Louisville & N. R.R.* 323 U.S. 192, 199-200 (1944). To counterbalance this majoritarian power, unions are bound by a correlative duty of fair representation implied from the statutory grant of representational authority. *United Steelworkers* v. *Rawson*, —— U.S. ——, 58 U.S.L.W. 4556, 4559 (U.S. May 14, 1990); *Vaca*, 386 U.S. at 177; *Steele*, 323 U.S. at 199, 202-03.

With respect to union conduct in collective bargaining, this Court has recognized that "[t]he complete satisfaction of all who are represented is hardly to be expected," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), and that unions must be afforded substantial discretion—"[a] wide range of reasonableness"—in assessing and resolving the competing, often conflicting interests within the workforce. *Id.* at 338. *Accord Steele*, 323 U.S. at 203. Even under the arguably more stringent DFR standard applicable to a union in its role as contract administrator, the need for union discretion is recognized

and the duty is breached only when a union's conduct is "arbitrary, discriminatory or in bad faith." *Vaca*, 386 U.S. at 190-92. Thus, the check on union discretion which the duty imposes is "purposefully limited" to insure that unions are not deprived of the flexibility which is essential to performance of their responsibilities. *Rawson*, 58 U.S.L.W. at 4559. *Accord International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 51 (1979).

Principles governing DFR litigation have similarly been carefully structured to further the proper role of the duty within the collective bargaining system. For example, in selecting an appropriate statute of limitations for DFR claims, this Court, in *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 163-72 (1983), rejected the typical adoption of varying state limitations periods for a federal action. *See Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946). Instead, the Court adopted as a uniform rule, the relatively brief NLRA six-month limitation for unfair labor practices, because it more properly balanced " 'the national interests in stable bargaining relationships,' " with the interests of employees in remedying the effects of unjust union conduct. *DelCostello*, 462 U.S. at 171-72 (quoting *United Parcel Serv., Inc.* v. *Mitchell*, 459 U.S. 56, 70 (1981)).

Finally, in "implement[ing] a remedial scheme that will best effectuate the . . . [RLA's] overarching legislative goal" of "facilitat[ing] collective bargaining and . . . achiev[ing] industrial peace," *Foust*, 442 U.S. at 47, this Court limited damages for a DFR breach to those needed to make the injured employee whole and which are strictly attributable to the union's misconduct. *Id.* at 49; *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970); *Vaca*, 386 U.S. at 197; *Steele*, 323 U.S. at 206-07. In *Foust*, this Court determined that punitive damages may not be awarded for DFR breaches by RLA unions. 442 U.S. at 52. *Accord Lewis* v. *Local Union 100, Laborers' Int'l Union*, 750 F.2d 1368, 1382 (7th Cir. 1984); *Quinn* v. *Di-*

Giulian, 739 F.2d 637, 647 (D.C. Cir. 1984). Because punitive damages are not make-whole in nature, they conflict with the essentially remedial scheme of the RLA. *Foust*, 442 U.S. at 51. In addition, substantial damage awards would undermine "the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area." *Id.* at 48.

In sum, the federal duty of fair representation has been carefully constructed to further the objectives of federal labor policy. Because that federal policy would be directly threatened if union representational conduct was subject to varying state laws, such state regulation must be preempted. *Richardson* v. *United Steelworkers*, 864 F.2d 1162, 1165-67 (5th Cir. 1989), *cert. denied*, 58 U.S.L.W. 3736 (U.S. May 22, 1990); *Jones* v. *Truck Drivers Local Union No. 299*, 838 F.2d 856, 861-62 (6th Cir. 1988), *cert. denied*, 110 S.Ct. 404 (1989); *Johnson* v. *United Food & Commercial Workers Union, Local 23*, 828 F.2d 961, 967 (3d Cir. 1987); *Evangelista* v. *Inlandboatmens' Union of the Pac.*, 777 F.2d 1390, 1400-01 (9th Cir. 1985); *Peterson* v. *Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1170 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Maynard* v. *Revere Copper Prod.*, 773 F.2d 733, 735-36 (6th Cir. 1985); *Condon* v. *Local 2944, United Steelworkers*, 683 F.2d 590, 594-95 (1st Cir. 1982). *See Vaca*, 386 U.S. at 188-93 (federal law governs duty of fair representation claim). *See generally San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959) (state regulation preempted where Congress has occupied the field); *Local 20, Teamsters* v. *Morton*, 377 U.S. 252, 261 (1964) (same).

The Fifth Circuit's approach to the mail fraud claim violates principles of federal preemption and, by substituting state law as the operative standard for union representational conduct, unravels federal labor law in an area which has been developed with painstaking care and deliberation.

Because the mail fraud statute does not define the "fraud" it proscribes, the substantive standard must be drawn from other sources. *Parr* v. *United States*, 363 U.S. 370, 389 (1960). As the court below found, plaintiffs' mail fraud claim challenges union collective bargaining activities; all the alleged mailings "occurred during the negotiation process." App. A, 48a. By not foreclosing, as a matter of law, the use of state common law fraud as the substantive basis for mail fraud under such circumstances, the lower court permits RICO plaintiffs to accomplish several results which are flatly prohibited by federal labor law.[8]

First, it allows plaintiffs to circumvent the *DelCostello* limitations period simply by repackaging their DFR claim as predicate acts of mail fraud under RICO. *Cf. Maynard*, 773 F.2d at 733 (allowing plaintiff to recast DFR claim as state claim would destroy uniformity required by *DelCostello*); *Jones*, 838 F.2d at 861 (same).

Second, by recycling their DFR claims into RICO claims, plaintiffs are able to secure treble damages, *see* 18 U.S.C. § 1964(c), for the same injuries they claim to have suffered due to defendants' alleged DFR breach. R. 14-16, 498. This result is patently at odds with *Vaca*, *Czosek* and *Foust*. *Cf. Texas Indus., Inc.* v. *Radcliff Materials*, 451 U.S. 630, 639 (1981) (characterizing antitrust treble damages as punitive in nature).

Third, by permitting RICO plaintiffs to rely on the state common law of fraud to challenge union representational conduct, the lower court allows potentially inconsistent state law norms to set the standards in an area at the heart of federal labor law. A union's conduct of negotiations does not "touch[] interests deeply rooted in

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[8] *See Rawson*, 58 U.S.L.W. at 4561 (Kennedy, J., dissenting) (agreeing that Supreme Court decisions holding state law preempted cannot be circumvented "by the more 'relabeling' as a tort claim an action that in law is based upon the collective bargaining process").

local feeling and responsibility." *Garmon*, 359 U.S. at 243.[9] Nor are plaintiffs pursuing an independent claim under rights granted by other federal legislation. *Cf. Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557 (1987) (claim under Federal Employers' Liability Act); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII claim). The substantive standards that would regulate union conduct under the lower court's approach are wholly a creature of state law, with RICO (and its treble damages) merely the procedural vehicle for their application.

Fourth, the lower court's conclusion that a union could be vicariously liable under RICO for a union representative's mail fraud, App. A, 43a, conflicts directly with the prohibition on union vicarious liability contained in Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106,[10] which applies "in all matters growing out of labor disputes," *United Bhd. of Carpenters* v. *United States*, 330 U.S. 395, 401 (1947), whether resting on federal law, *see id.*, or state law. *See United Mine Workers* v. *Gibbs*, 383 U.S. 715, 737 (1966). The reimposition, through RICO, of vicarious liability doctrine to labor disputes, an approach Congress consciously discarded years ago, *see Ramsey* v. *United Mine Workers*, 401 U.S. 302, 310 (1971), is a further indication of the damage the decision below portends to settled principles of federal labor law.

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[9] *See generally Farmer* v. *United Bhd. of Carpenters*, 430 U.S. 290, 296-301 (1977).

[10] 29 U.S.C. § 106 provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof.

The foregoing consequences of the decision below can be expected to induce widespread resort to RICO via mail fraud in an area governed by federal labor law. This will not only unsettle the system of collective bargaining, *contra Foust* and *DelCostello*, but require extensive, costly litigation of matters which, if pled directly under state law, would be precluded on preemption grounds.

B. Application of State Common Law to Matters Related to ERISA Retirement Plans

The court below held that plaintiffs stated a RICO predicate mail fraud claim, under the state common law of fraud, *see supra*, p. 7, based upon Huttinger's allegedly improper continued receipt by mail of benefits from the TACA retirement plan. This decision directly conflicts with ERISA's preemption provisions and related decisions of this Court.

ERISA preempts any and all state law (with exceptions not relevant here) that may "relate to" an employee benefit plan. 29 U.S.C. § 1144(a). Accordingly, ERISA displaces state law "if it has a connection with or reference to such a plan." *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85, 97 (1983). *Accord Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47 (1987). *See also Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 62 (1987). As this Court noted in *Dedeaux*, "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." 481 U.S. at 54. *Accord Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). Claims of common law fraud in connection with an employee benefit plan "relate to" the plan within the meaning of 29 U.S.C. § 1144(a) and are preempted. *E.g.*, *Dedeaux*, 481

U.S. at 47.[11] ERISA's comprehensive enforcement scheme is no less threatened if the state fraud claim is raised through mail fraud; indeed, the danger is arguably greater in this context given the criminal underpinnings of RICO and because Congress purposefully limited the criminalization of ERISA violations to matters not presented by Huttinger's receipt of benefits. *See infra*, p. 20. Review of the decision below is essential to forestall this potentially severe threat to ERISA's remedial scheme.

C. Extension of Criminal Statutes to Labor Conduct Not Criminalized by Congress

By subjecting to criminal sanction labor conduct that Congress has chosen not to criminalize, the Fifth Circuit's decision substantially alters the established interplay between federal labor law and criminal law.

Because the RICO predicate statutes are all criminal, a court assessing their reach "must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint" and "typically" dictates a " 'narrow interpretation.' " *Dowling* v. *United States*, 473 U.S. 207, 213 (1985) (citations omitted).[12] This approach is particularly necessary in the labor sphere, because Congress crafted the labor laws

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[11] *Accord Lea* v. *Republic Airlines, Inc.*, 134 L.R.R.M. (BNA) 2165, 2170-71 (9th Cir. 1990); *Lee* v. *E.I. DuPont de Nemours & Co.*, 894 F.2d 755, 758 (5th Cir. 1990); *Farlow* v. *Union Cent. Life Ins. Co.*, 874 F.2d 791, 793-94 (11th Cir. 1989); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986); *Foltz* v. *U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1175-76 (D.D.C. 1986); *Ogden* v. *Michigan Bell Tel. Co.*, 571 F.Supp. 520, 522-24 (E.D. Mich. 1983).

[12] *Accord Williams* v. *United States*, 458 U.S. 279, 290 (1982); *United States* v. *Bass*, 404 U.S. 336, 347 (1971); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952).

to be essentially remedial, *Foust*, 442 U.S. at 52, and narrowly delineated those actions which merit criminal sanction. *E.g.*, 29 U.S.C. § 186.[13] These considerations prompted the Second Circuit, in *United States* v. *DeLaurentis*, 491 F.2d 208, 212-14 (2d Cir. 1974), to decline to apply 18 U.S.C. § 241,[14] a general federal criminal statute, to union officials' coercion of employees to strike, because neither the wording nor legislative history of the NLRA reflected an intent to criminalize conduct which constituted unfair labor practices under federal labor law.

Similarly, the determination by Congress to include only a limited number of crimes in the labor area as RICO predicate acts, *see* 18 U.S.C. § 1961(1),[15] counsels that RICO scrutiny of labor activities be confined to conduct subject to those statutes. *See Butchers Union Local 498* v. *SDC Investment, Inc.*, 631 F.Supp. 1001, 1009 (E.D. Cal. 1986). The court below ignored this Congressional determination and this Court's guidelines for criminal statutory construction by its treatment of the

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[13] The single criminal provision of the RLA, 45 U.S.C. § 152 Tenth, applies only to carriers, not unions, and there has been only one reported prosecution. *United States* v. *Winston*, 558 F.2d 105 (2d Cir. 1977).

[14] 18 U.S.C. § 241 provides in pertinent part that:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
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> . . .
>
> [S]hall be fined not more than $10,000 or imprisoned not more than ten years, or both . . .

[15] 18 U.S.C. § 664 (theft or embezzlement from an employee benefit plan); 18 U.S.C. § 1951 (extortion); 18 U.S.C. § 1954 (unlawful welfare fund payments); 29 U.S.C. § 186 (employer payments to a labor organization or its agents); 29 U.S.C. § 501(c) (embezzlement of union funds).

two predicate acts it found to have been adequately stated: 18 U.S.C. § 664 and mail fraud.

Section 664 is directed solely at safeguarding assets of "any employee welfare benefit plan or employee pension benefit plan" from embezzlement, theft or conversion. 18 U.S.C. § 664; H. R. Rep. No. 998, 87th Cong., 1st Sess. 16 (1961), *reprinted in* 1962 U.S. Code Cong. & Ad. News 1532, 1547; *United States* v. *Andreen*, 628 F.2d 1236, 1240-41 (9th Cir. 1980) (the "essence of the crime is theft" from employee welfare and pension funds); *Ris* v. *Bedell*, 699 F.Supp. 429, 436 (S.D.N.Y. 1988) (same). Notwithstanding the limited scope of this statute, the lower court concluded that 18 U.S.C. § 664 could be violated if plaintiffs established a breach of "*any* fiduciary duties" under ERISA or under Section 501(a) of the Landrum-Griffin Act, 29 U.S.C. § 501(a). App. A, 56a & n.102 (emphasis added); App. H, 104a.

Regardless of the scope of § 501(a)'s fiduciary duties, the only conduct which Congress criminalized in § 501, and which it included as a RICO predicate act, 18 U.S.C. § 1961(1), is embezzlement from *union* funds under 29 U.S.C. § 501(c). *See United States* v. *Stockton*, 788 F.2d 210, 217 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986); *United States* v. *Marolda*, 615 F.2d 867, 868 (9th Cir. 1980); *Colella* v. *United States*, 360 F.2d 792, 799 (1st Cir.), *cert. denied*, 385 U.S. 829 (1966). Nothing in the record establishes any embezzlement of ALPA funds. To hold, as did the court below, that the fiduciary duties imposed by § 501(a) may provide a basis for criminal sanction under 18 U.S.C. § 664 is, in essence, to create a new federal crime, despite the limited scope of § 501(c), and to add § 501(a) to the list of RICO predicate acts. This approach conflicts with the established rule that "legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.[16]

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[16] The Fifth Circuit's untoward reading of § 501(a) is particularly inapt in this case given that the complaint does not assert a

The same consequences flow from the Fifth Circuit's apparent determination that any breach of ERISA fiduciary duties may establish a violation of 18 U.S.C. § 664, even if unconnected to a misappropriation of plan funds. For example, this would make the failure by an ERISA plan trustee to follow the prudent man rule under 29 U.S.C. § 1104 in investing plan assets a felony. Nothing in the wording or legislative history of § 664 or ERISA reflects such an intent. To the contrary, ERISA attaches criminal liability only to willful violations of its reporting and disclosure requirements, 29 U.S.C. § 1131; *Dedeaux*, 481 U.S. at 53, thereby demonstrating that ERISA's fiduciary obligations are to be enforced only through ERISA's comprehensive civil remedial scheme. 29 U.S.C. § 1132. *See Russell*, 473 U.S. at 147. *Cf. Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981); *Switchmens Union* v. *National Mediation Bd.*, 320 U.S. 297, 301 (1943) ("the specification of one remedy normally excludes another").

The Fifth Circuit compounded its error through its expansive application of the general mail fraud statute which effectively subjects a union to criminal sanctions for a DFR breach. This approach conflicts with that of other courts which have rejected application of the mail fraud RICO predicate statute to conduct regulated by federal labor law. *SDC Investment*, 631 F.Supp. at 1011 (E.D. Cal. 1986) (employer attempts to frustrate organizational rights of employees); *Brown* v. *Keystone Consol. Indus.*, 680 F.Supp. 1212, 1225-26 (N.D. Ill. 1988) (employer misrepresentations in collective bargaining. *See MHC, Inc.* v. *United Mine Workers*, 685 F.

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§ 501(a) claim (even the RICO Case Statement only references § 501(c), R.767). Furthermore, the lower court's approach overrides the remedial scheme of § 501: plaintiffs did not comply with the procedural requirements for filing a § 501(a) suit, *see* 29 U.S.C. § 501(b); and the relief sought was against the union, rather than, as § 501(a) requires, for its benefit. *See Phillips* v. *Osborne*, 403 F.2d 826, 832 (9th Cir. 1968).

Supp. 1370, 1378 (E.D. Ky. 1988) (noting that expansive criminalization of conduct regulated by federal labor law could have a chilling effect on legally permissible concerted activities).

The Fifth Circuit's decision to extend these criminal statutes in this manner, and, by so doing, to expand the reach of RICO, whose constitutional footing has already been questioned, *see H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 109 S.Ct. 2893, 2909 (1989) (Scalia, J., concurring), provides an additional compelling basis for this Court's review.

II. THE DECISION OF THE COURT BELOW WITH RESPECT TO THE RICO "CONTINUITY" REQUIREMENT IS IN CONFLICT WITH RICO DECISIONS OF THIS COURT AND OF OTHER CIRCUITS AND WITH THIS COURT'S DECISIONS REGARDING SUMMARY JUDGMENT EVIDENTIARY REQUIREMENTS

As an element of their RICO claim, plaintiffs must establish that defendants engaged in a pattern of racketeering activity. 18 U.S.C. § 1962; *H.J. Inc.*, 109 S.Ct. at 2897. Pattern requires *"continuity plus relationship."* *Sedima, S.P.R.L.* v. *Imrex, Co.*, 473 U.S. 479, 496 n.14 (1985) (emphasis in original; citations omitted). The Fifth Circuit relied on but two allegations to hold that the requisite continuity may exist: (1) that ALPA was named as a defendant in a second RICO lawsuit by pilots employed by a different airline, and (2) that Huttinger continued to receive retirement benefits. The court's decision fundamentally conflicts with two important lines of Supreme Court authority.

First, the decision below flouts settled evidentiary requirements for opposing summary judgment motions. Under Rule 56(e), Fed. R. Civ. P., a party opposing a summary judgment motion "may not rest upon the mere allegations of his pleadings;" rather he must "set forth

specific facts showing that there is a genuine issue for trial" by affidavits, discovery responses, or other facts which "would be admissible in evidence." *Accord Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-50, 256 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-24 (1986); *First Nat'l Bank of Am.* v. *Cities Serv. Co.*, 391 U.S. 253, 288-90 (1968). Despite the fact that plaintiffs may not rely on the allegations of *their own complaint* to defeat summary judgment, the decision below permits plaintiffs to create a disputed fact issue on the RICO continuity element merely by relying on the unsubstantiated allegations of a *different* RICO *complaint* filed by *different plaintiffs* against the same defendant. This incongruous and unprecedented approach is fundamentally at odds with the established evidentiary requirements for opposing summary judgment motions, and is particularly egregious here, where the second lawsuit, *Adair* v. *Air Line Pilots Ass'n, Int'l*, 86-C-1939 (D. Colo. Jan. 11, 1988), has been dismissed.[17]

Second, the decision below eviscerates the established criteria for establishing RICO continuity. Under *H.J. Inc.*, 109 S.Ct. at 2902, continuity requires either: (1) repeated racketeering activity "extending over a substantial period of time," or (2) "the threat of continued racketeering activity." The Fifth Circuit apparently recognized that the first alternative could not be satisfied, as the alleged "conspiracy," directed at the singular goal

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[17] The only "evidence" in *Landry* of the *Adair* allegations consisted of attachments to a brief of the *Landry* plaintiffs of the *Adair* complaint and a brief filed by the *Adair* plaintiffs in opposing (unsuccessfully) ALPA's motion to dismiss and/or for summary judgment. R. 1203-14. In claiming that this "evidence" was "unrefuted by any summary judgment evidence," App. A, 43a, the court not only placed the burden of production on the wrong party, but was plainly in error. A copy of the decision dismissing *Adair* was annexed to the ALPA/Huttinger brief filed with the Fifth Circuit in *Landry*, together with a copy of an earlier letter provided to the trial court and other counsel of record in *Landry* along with the *Adair* decision immediately following its entry.

of relocating the pilot base, "briefly flourished and faded," App. A, 59a-60a, having been "achieved in a matter of months." App. A, 60a.[18] However, the court found that because ALPA was named as a RICO defendant by two sets of unrelated plaintiffs, it may "pose[] a threat of continuing harm." To find this sufficient to establish continuity is to reduce RICO "continuity" to a meaningless, formalistic requirement.

Similar consequences flow from the lower court's determination that Huttinger's receipt of retirement benefits, long after the alleged RICO scheme terminated, somehow can indicate a threat of continued racketeering activity. Were the Fifth Circuit's approach adopted, every "finite scheme—or at least those involving economic crimes"—would be classified as continuous racketeering activity. *Bingham* v. *Zolt*, 683 F.Supp. 965, 970 (S.D.N.Y. 1988).

Further, this Court's decisions require a plaintiff to demonstrate that a defendant, through a pattern of racketeering, controlled, conducted or participated in the affairs of a RICO enterprise. *H.J. Inc.*, 109 S.Ct. at 2902; *Sedima*, 473 U.S. at 496. *See United States* v. *Turkette*, 452 U.S. 576, 580, 584, 591 (1981). *See also Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). The decision below ignores this requirement, as nothing in the record ties Huttinger's current benefits to the purported enterprise

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[18] Other courts have found an absence of RICO continuity where the alleged racketeering scheme was of similar duration. *Sutherland* v. *O'Malley*, 882 F.2d 1196, 1204-05 (7th Cir. 1989) (no continuity where the goal was accomplished in a five-month period); *Eastern Pub. and Advertising, Inc.* v. *Chesapeake Pub. and Advertising, Inc.*, 895 F.2d 971, 972-73 (4th Cir. 1990) (no continuity where only single scheme of three months' duration); *Phelps* v. *Wichita Eagle-Beacon*, 886 F.2d 1262, 1273-74 (10th Cir. 1989) (no continuity where RICO scheme had one short-lived, discrete goal); *Marks* v. *Pannell Kerr Forster*, 811 F.2d 1108, 1111 (7th Cir. 1987) (no continuity where predicate acts spanned several months).

(ALPA). *Cf.* App. A, 60a ("[i]n reality, the association of ALPA and Huttinger had no alleged purpose other than to commit the predicate acts leading up to the relocation"); *Occupational-Urgent Care Health Sys., Inc.* v. *Sutro & Co.*, 711 F.Supp. 1016, 1025-27 (E.D. Cal. 1989).[19] The absence of such a nexus further eliminates any basis for holding ALPA vicariously liable for Huttinger's "continuing" racketeering acts. *See also supra*, p. 15.

In sum, the Fifth Circuit's treatment of the RICO continuity requirement departs so dramatically from this Court's decisions that it compels review of this case.

III. THE DECISION BELOW, BY IMPOSING ERISA FIDUCIARY OBLIGATIONS PRIOR TO THE TIME A RETIREMENT PLAN IS ESTABLISHED, CREATES A SPLIT IN THE CIRCUITS AND SIGNIFICANT ADVERSE CONSEQUENCES FOR RETIREMENT PLANS, EMPLOYEES AND BENEFICIARIES, WHICH MERIT THIS COURT'S REVIEW

The fiduciary obligations created by Title I of ERISA, 29 U.S.C. § 1104, apply (with exceptions not relevant here) only to "employee benefit *plan*[*s*]," including pension plans, 29 U.S.C. § 1002(3), "*established* or maintained" by an employer, a union, or both. 29 U.S.C. § 1003(a) (emphasis added). In *Donovan* v. *Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*), the Eleventh Circuit held that a plan is "established," and ERISA's fiduciary obligations apply, only "if from the surrounding circumstances a reasonable person can as-

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[19] Even the court below found plaintiffs' bald assertion that Huttinger used his "power" within ALPA to improperly continue in his position as negotiator for the TACA pilots to be without evidentiary support. App. A, 46a-47a. Moreover, Huttinger's term as an Executive Vice President of ALPA ended before the alleged racketeering activity began, R. 939, and, at the time of the alleged racketeering scheme, he "controlled" the votes of less than 1% of the ALPA membership. R. 939.

certain the intended benefits, a class of beneficiaries, the source of financing and procedures for receiving benefits." [20] The *Dillingham* approach is entirely consistent with this Court's decision in *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987). In holding, in *Fort Halifax*, that ERISA applies only to "plans," the Court explained that the focus of ERISA's regulatory scheme "is on the administrative integrity of benefit *plans*—which presumes that some type of administrative activity is taking place," *id.* at 15 (emphasis added), because "only 'plans' involve administrative activity potentially subject to . . . abuse." *Id.* at 16.

The decision below directly conflicts with *Dillingham* and its progeny. Despite acknowledging that it was not until 1985 that "all the [Dillingham] requirements for a plan were met," App. A, 20a n.32, the court initially held that ERISA's fiduciary duties were triggered "as a matter of law" on February 1, 1982, solely because that was the "effective date" provided in the April 1985 plan.[21] App. 22a-23a. While it partially retreated from

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[20] The *Dillingham* formulation has been uniformly followed. *See Harris* v. *Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986); *Ed Miniat, Inc.* v. *Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985); *Garred* v. *General Am. Life Ins. Co.*, 723 F.Supp. 1325, 1327-28 (W.D.Ark. 1989); *Pitre* v. *Louisiana Health Serv. and Indem. Co.*, 122 F.R.D. 497, 499 (W.D. La. 1988); *Rollo* v. *Maxicare of Louisiana, Inc.*, 695 F.Supp. 245, 247 (E.D. La. 1988); *Dodd* v. *John Hancock Mutual Life Ins. Co.*, 688 F.Supp. 564, 566-67 (E.D. Cal. 1988); *Rasmussen* v. *Metropolitan Life Ins. Co.*, 675 F. Supp. 1497, 1500 (W.D. La. 1987); *Bausch & Lomb, Inc.* v. *Smith*, 630 F.Supp. 262, 263 (W.D.N.Y. 1986).

[21] The court below not only ignored the *Dillingham* requirements, but also the terms of the February 1982 agreement by which TACA and ALPA agreed to establish a retirement plan *in the future*. That agreement provided, *inter alia*, that "[t]he specifics of the retirement plan for pilots *shall be* determined" and that TACA's contributions were to be held in trust "*until such time as the retirement plan for pilots has been established and implemented.*" (Emphasis added). *See* App. A at 20a. The Fifth Circuit chose to "ignore the implica-

that holding on rehearing by directing the trial court to treat the date the plan went "into effect" as a disputed factual issue, App. H, 104a, the decision below still leaves open the possibility that there is an ERISA fiduciary duty to "implement" a plan and that ERISA fiduciary obligations may commence prior to plan establishment. The prospect of such pre-establishment ERISA liability not only presents a direct conflict with *Dillingham* and its progeny, but also with the consistent position of this Court and lower courts that the conduct of unions and employers with respect to the negotiation, establishment or design of collectively bargained employee benefit plans is governed by the national labor laws, not ERISA. *See UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 573-76 (1982); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 336-38 (1981).[22]

An imposition of ERISA fiduciary duties prior to plan establishment also poses significant, adverse consequences for retirement plans and, in turn, for the individuals who are or would be covered by such plans. There is often a time lapse between the initial agreement of employers and unions to create a plan and the actual plan establishment. Unions attempt to obtain commencement of employer contributions during this pre-establishment period because this improves the future plan's financial base. To encourage such "early" employer funding (which employers are not legally required to provide), Section 401(i) of the Internal Revenue Code (the "Code"), 26 U.S.C. § 401(i), grants retroactive qualifica-

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tions of these terms . . . because the April, 1985 retirement plan is explicitly retroactive to February, 1982." App. A at 22a.

[22] *Accord Lea*, 134 L.R.R.M. at 2169-70; *United Ind. Flight Officers, Inc.* v. *United Air Lines, Inc.*, 756 F.2d 1274, 1280 (7th Cir. 1985); *Sutton* v. *Weirton Steel Div. of Nat'l Steel Corp.*, 567 F.Supp. 1184, 1201 (N.D. W.Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). *See also Adams* v. *General Tire & Rubber Co.*, 794 F.2d 164, 166 (4th Cir. 1986).

tion, and thus favorable tax treatment, to a trust created through collective bargaining to serve as a repository for such pre-plan contributions until the qualified plan and trust are established. To take advantage of Section 401(i) and to secure tax-deductibility for the pre-plan contributions under Section 404 of the Code, 26 U.S.C. § 404, the plan, when established, must have (as here) a retroactive "effective" date, relating back to the year in which the contributions were first made.[23]

The decision below substantially undermines the beneficial objectives of § 401(i) of the Code. If, by agreeing to make plans retroactively effective, employers and unions subject themselves, in advance of plan establishment, to ERISA fiduciary obligations and attendant potential liability of unknown dimensions, they will undoubtedly be far less likely to effectuate their plans retroactively. If that occurs, employers will not fund plans prior to their establishment, which will deprive plan participants of the additional financial security provided by pre-establishment funds.[24] Moreover, in plans where the level of employer contributions are fixed by contract, the loss of pre-plan contributions is likely to result in lower benefit levels. Finally, unless plans are retroactively effective, employees who die, become disabled or retire during the retroactive period will, in all likelihood, not be covered. These significant adverse consequences of the decision below will be felt not by employers or unions, but by the very persons whom ERISA was designed to

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[23] Under Section 404(a)(1)(A) of the Code, an employer's pension contributions are deductible for any given year only if, at the end of such year, there is a qualified pension plan and trust in effect.

[24] While the Pension Benefit Guaranty Corporation ("PBGC") guarantees payment of certain minimum pension benefits, *see generally* 29 U.S.C. §§ 1301-1323, specific statutory limitations on such guarantees, *e.g.*, 29 U.S.C. §§ 1322, 1322A, 1322B, make increased employer funding critical to participants' actual receipt of promised benefits as well as to the PBGC's continued solvency.

benefit—employees and their beneficiaries. *Shaw*, 463 U.S. at 90.

Review by this Court is needed to prevent the harmful, practical effects to ERISA plans of the decision below and to reestablish the uniformity in judicial treatment of these important ERISA issues.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3363

FRANK LANDRY, *et al.*,
Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL AFL-CIO, TACA AIRLINES, S.A. and CHARLES J. HUTTINGER,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Jan. 31, 1990

Before BROWN, JOHNSON and DAVIS, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Several airline pilots brought this action against their former employer, union, union representative, and the administrator of their pension plan. The pilots alleged violations of labor law, ERISA, and RICO. Granting motions for summary judgment, the Court held: (i) the

statute of limitations barred the labor law claims; (ii) ERISA imposed no fiduciary duties on the defendants; and (iii) the pilots failed to meet the necessary elements of a RICO claim. The Court also granted a protective order preventing further discovery of the defendants. On appeal, we affirm the lower court's holding with respect to the statute of limitations and the protective order. However, we find that summary judgment was improper on the ERISA and RICO claims. Accordingly, we reverse and remand to the trial court the ERISA and RICO claims.

I. The Facts

A. History of Relations between TACA and ALPA

1. If at first you don't succeed . . .

TACA International Airlines, S.A. (TACA), incorporated under the laws of El Salvador, operates in Central America and the United States. From 1949 until 1985, all TACA pilots were based in New Orleans, Louisiana. In 1968, the Airline Pilots Association, International, AFL-CIO (ALPA), was certified as the collective bargaining representative for all pilots employed by TACA, and thereafter negotiated numerous collective bargaining agreements with TACA.

The relevant history of this case begins over two decades ago. In 1969, shortly after TACA entered into its first agreement with ALPA, the Republic of El Salvador requested that TACA relocate its pilot base from New Orleans to El Salvador. When TACA attempted to comply with the request of the Salvadoran government, ALPA sought and obtained an injunction, maintaining that if the relocation occurred, ALPA could no longer, under Salvadoran law, represent the pilots. A bar of representation would have abrogated the recently-entered collective bargaining agreement between ALPA and TACA. This Court affirmed the district court injunction. *Ruby v. TACA International Airlines, S.A.*, 439 F.2d 1359 (5th Cir.1971).

2. . . . try, try, again . . .

In October of 1979, TACA and ALPA entered into a collective bargaining agrement, effective January 1, 1980 and amendable on December 31, 1983 (the 1980 collective bargaining agreement). In October, 1983, ALPA and TACA commenced negotiations to amend and continue the 1980 collective bargaining agreement.

However, on December 20, 1983, the Republic of El Salvador adopted a new Constitution; Article 110, § 4 of that constitution provided that Salvadoran public service companies must have their work center and base of operations in El Salvador. *Airline Pilots Ass'n, Int'l v. TACA, Int'l Airlines, S.A.*, 748 F.2d 965, 968 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985). As a result, while in the midst of negotiations, TACA announced its intention to immediately relocate its pilot base from New Orleans to El Salvador, to unilaterally terminate the existing agreement and impose new terms and conditions of employment on its pilot employees, and to withdraw its recognition of ALPA. R. 503. Pilots were given until December 31, 1983 to accept the new terms or lose their employment with TACA. Meanwhile, because of the potential that the pilots would not move, TACA began advertising for new pilots.

ALPA filed a lawsuit in the United States District Court for the Eastern District of Louisiana, seeking injunctive relief against TACA. Judge Feldman issued a permanent injunction prohibiting TACA from relocating the pilot base, unilaterally changing the terms of employment, recruiting replacement pilots, and interfering with the pilots' choice of ALPA as their bargaining agent.

This court affirmed the injunction, but stated

> we neither hold nor suggest that TACA may not relocate its pilot base. We hold only that TACA must

> relocate its pilot base and effect the other intended steps in accordance with the substantive laws and procedures set forth in the Railway Labor Act and other relevant domestic laws.

Id., at 972.

3. . . . until you do

Between 1984 and 1985, TACA and ALPA continued negotiations under the auspices of the National Mediation Board (NMB). On July 24, 1985, TACA and ALPA reached an agreement entitled "Pilots' Agreement," which superseded the 1980 collective bargaining agreement under which the parties had been operating. The "Pilots' Agreement" provided that ALPA would not oppose TACA's relocation of its pilot base ot El Salvador after August 31, 1985. All pilots on the seniority list as of June 30, 1985 could elect either: (i) to receive severance pay ($1,200.00 to each pilot for each full year of service and *pro rata* amounts for partial years, with length of service calculated through August 31, 1985), and other benefits (passes and insurance), or (ii) to continue their employment as TACA pilots, based in El Salvador. R. 504.

On July 24, 1985, Mr. Charles J. Huttinger, a TACA pilot who represented ALPA in the negotiations with TACA, sent a letter to all TACA pilots stating that "The Association has reached a tentative agreement (subject to ratification) with TACA. . . . The Company has agreed to a total package which we believe justifies your support."

Some of the pilots allegedly understood the July 24, 1985 letter to mean that the agreement would not be final until it was ratified by the individual pilots. However, on August 3, 1985, a representative of TACA sent a memorandum to all TACA pilots, informing them that "an agreement [has been] reached by which TACA will move its pilots base to El Salvador effective September

1, 1985." The memorandum further stated that "the decision to continue working for the company or retire must be made by August 15, 1985, at the latest." Each of the named plaintiffs, except Gary Zyriek, elected to take severance pay. Mr. Zyriek had changed jobs and was flying for United Airlines by June 30, 1985, the date of eligibility for severance payments.

The July 24, 1985 "Pilots' Agreement" further provided that TACA's obligation to contribute to the pilots' retirement fund would cease as of August 31, 1985. Although the parties dispute the effective date of the retirement plan (*see infra*), it was formally implemented on April 18, 1985. Fringe Benefit Administrators (FBA) was named as the plan administrator and the First National Bank of Covington was the plan trustee.

On December 17, 1985, TACA and ALPA entered into a final "settlement agreement" which resolved all claims arising out of the July 24, 1985, "Pilots' Agreement." Among other things, the agreement provided that "ALPA agrees and acknowledges that TACA has no further obligations to the individuals who selected the severance option under the 'Pilots' Agreement'. . . . concerning insurance coverage or benefits of any kind, or premium payments of any kind."

B. Procedural History

In the original Complaint, the pilots [1] asserted that the July 24, 1985 "Pilots' Agreement" was negotiated and executed in breach of ALPA's duty of fair representation (DFR) to the TACA pilots and TACA's prior collective

[1] There were fifteen plaintiff pilots at the trial court: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, Thomas Brignac, T.Q. Howard, Robert Lukenbill, Bert Haffner, Walter Keller, Joe Haas, Gary Zyriek, Don Jenkins, Emile Cerisier, and M. Letona. The same pilots are appellants on appeal, except for Thomas Brignac, Robert Lukenbill, Bert Haffner, and Gary Zyriek, who have dropped out of the case.

bargaining agreement with ALPA, in violation of the Railway Labor Act (RLA), 45 U.S.C. §§ 151-88, and the National Labor Relations Act (NRLA), 29 U.S.C. §§ 141-87. Pilots sought approximately $30 million in damages. R. 1-18. Pilots did not file their Complaint until July 23, 1986. R. 1.

Pilots alleged that ALPA agreed to enter into the July 24, 1985 agreement as a result of TACA's threat to sue ALPA because some of the pilots purportedly sabotaged TACA property at ALPA's direction. The pilots characterized this conduct as a breach of the duty of fair representation by ALPA. In addition, the pilots have asserted that Mr. Huttinger was unqualified to represent ALPA in the negotiation of the "Pilots' Agreement." Huttinger had been placed on "sick" status by TACA, and according to the pilots, under the Constitution and By-Laws of ALPA, a pilot classified as "sick" was not permitted to hold an office within the union.

Moreover, the pilots have filed the affidavit of Emile Cerisier, one of the plaintiffs. Mr. Cerisier states that Mr. G.M. Padgett was a TACA pilot who was a member of the ALPA negotiation team that arranged the relocation of the pilot base to El Salvador. The pilots claim that Mr. Padgett should not have been allowed on the team because he had been suspended by TACA for sabotaging TACA equipment.

The Original Complaint also alleged that ALPA, TACA, and FBA violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. The pilots claim that ALPA, TACA, and FBA breached fiduciary duties imposed by ERISA in the administration and implementation of the Plan. More specifically, the pilots allege that the defendants: (i) delayed Plan implementation for three years; (ii) refused to disclose Plan details despite repeated requests; (iii) failed to disclose various information about the fund's location, amount,

etc.; and (iv) colluded among each other to allow Huttinger to illegitimately receive retirement benefits.

FBA filed an answer on October 22, 1986. R. 261. ALPA and TACA filed motions to dismiss, or alternatively, for summary judgment, contending that the DFR/breach of contract claim was barred by the applicable six-month statute of limitations and that the pilots had failed to state a claim for relief under ERISA. R. 33-51, 240-60. On January 13, 1987, the pilots noticed the depositions of Charles Huttinger and First National Bank, eventually postponed at the request of the defendants. R. 383-86.

On February 10, 1987, while those motions were pending, the pilots asked the District Court to stay all proceedings and to transfer the case for consolidation with an action filed by ALPA in 1983, *Air Line Pilots Ass'n, Int'l v. TACA Int'l Airlines, S.A.*, Civ. No. 83-6238 (E.D.La.), *aff'd*, 748 F.2d 965 (5th Cir.1984), *cert. denied*, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985), for the expressed purpose of seeking an adjudication that TACA was in contempt of an injunction issued to ALPA in the 1983 case. R. 408-13. Judge Feldman, who had presided over the earlier action, denied pilots' motion, explaining that "[t]his case had been closed for several years, and this Court no longer has any jurisdiction in this matter." Supplemental Record on Appeal, Minute Entry, (Feldman, J.), March 13, 1987. By subsequent Order, the Court below denied pilots' motion to transfer, determining, in consultation with Judge Feldman, "that the issues presented in this matter [the case *sub judice*] are not sufficiently similar to warrant transfer." R. 427.

On March 11, 1987, the pilots filed an amended and supplemental Complaint, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. §§ 1961-68, and requesting nearly $100 million in damages. R. 493-99. Huttinger was added as a de-

fendant in the Amended Complaint, which incorporated all of the allegations in the original Complaint.

By Opinion and Order dated April 24, 1987, the District Court granted the ALPA and TACA motions directed at the Original Complaint, holding, *inter alia*, that the pilots had failed to demonstrate that "TACA or ALPA should be held liable as a 'fiduciary' within the meaning of ERISA and, to the extent that the pilots intend to assert a 'hybrid' claim under the RLA,[2] it is clearly barred by the six-month [statute] of limitations." R. 511.

In May, 1987, TACA, ALPA, and Huttinger responded to the RICO claim in the Amended Complaint by filing motions to dismiss or alternatively, for summary judgment. R. 516-83; 584-608. The Court denied the motions without prejudice and ordered the pilots, in accordance with a newly adopted Standing Order, to file a RICO Case Statement (RICO St.)[3] R. 759-62. Pursuant to express leave of the Court, R. 758, ALPA, Huttinger, and TACA renewed their dispositive motions, R. 855-974, 798-854, following the filing of pilots' RICO St. R. 764-90.

On November 18, 1987, the defendants moved for protective orders to quash depositions of TACA, Huttinger, and FBA that the pilots had noticed for October. R. 1007. The protective order was granted on December 11, 1987. R. 1104.

On December 14, 1987, the pilots filed a motion for the Court to reconsider the application of tolling principles to the dismissal of their DFR claims, contending that the Court had "overlooked the doctrine of equitable tolling." R. 1109. A request by the pilots to file a supplemental brief in support of their motion to reconsider was dis-

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[2] *See infra.*

[3] *See* Appendix A; *see also Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).

allowed. On February 29, 1988, the Court denied the pilots' motion for reconsideration and ordered the pilots to respond to the defendants' request for sanctions.

By Opinion and Order dated March 17, 1988, the District Court granted summary judgment on the RICO claim. R 1295-1311. Judgments pursuant to F.R.Civ.P. 54(b) in favor of ALPA and TACA were entered on April 28, 1988, R. 1315, and, as to Huttinger, on May 4, 1988. R. 1316. Eleven of the fifteen plaintiffs filed a notice of appeal on May 27, 1988.

The following issues are presented on appeal: (i) Did the District Court apply the appropriate statute of limitations to the pilots' labor claims, and did it give adequate consideration to when the limitations period began to run? (ii) Did the lower court properly find no ERISA plan was established until the spring of 1985, and that neither ALPA, Huttinger, nor TACA were fiduciaries under ERISA? (iii) Did the court below err in ruling against the pilots' RICO claims? (iv) Did the trial judge abuse his discretion in quashing discovery depositions the pilots had noticed for hearing?

II. Statute of Limitations

In their Original Complaint, pilots alleged that ALPA breached its duty of fair representation (DFR), implied under the RLA. They also alleged that TACA was a party to the DFR breach. The breach arose during the process of negotiating a new collective bargaining agreement—which ultimately resulted in the removal of the TACA pilot base to El Salvador and the severance of all of the plaintiffs to this action. The trial court found that by its allegations, pilots brought a "hybrid" claim.[4]

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[4] In the original "hybrid" action, an employee brought a claim against his employer under § 301 of the NLRA for breach of the collective bargaining agreement and against his union for breach of the duty of fair representation implied under the NLRA. The two

Such claims are subject to a six month statute of limitations.[5] The complaint was filed August 25, 1986, but the cause of action accrued, at the latest, on December 17, 1985 when the settlement agreement was signed. Thus the pilots' labor law claims were held time barred.

Pilots challenge this ruling on several grounds. They assert that (1) this is not a *DelCostello* "hybrid" action; (2) more appropriate limitations periods may be found by resort to Louisiana's one year statute of limitations for tort law and ten year statute of limitations for contract law; (3) the running of the statute should have been tolled until defendants' fraud and collusion was discovered by pilots; (4) defendants should have been required to honor the judgment that forbid their relocation unless it was accomplished in compliance with the RLA; (5) any decertification of ALPA as the employees' collective bargaining agent should have been carried out by the National Mediation Board.

We find that dismissal under F.R.Civ.P. 56(c) was warranted because it was clear from the face of the complaint and the declarations submitted that no material facts were in dispute and that defendants were entitled to judgment as a matter of law on the undisputed facts.[6]

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actions are inextricably intertwined, for in order to prevail on one, the employee must prevail on both. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476, 489 (1983). As we shall develop, *infra*, this original meaning has been expanded to apply to the type of claim brought here.

[5] *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). This limitation period is imported from § 10(b) of the NLRA and applies both to the cause of action against the union and to the one against the employee. The *DelCostello* court chose to apply this analogous federal statute of limitations rather than borrow from state law.

[6] "[T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions

We agree with the trial court that *DelCostello* states the appropriate limitations period and that pilots' labor law claims were time-barred.

Pilots argue that *DelCostello* does not apply for two reasons. First, this case implicates the RLA, while *DelCostello* dealt with a violation of § 301 of the NLRA. Second, *DelCostello* arose in the context of a grievance proceeding under an existing collective bargaining agreement. In the case *sub judice* by contrast, the dispute arose out of the process of negotiating a collective bargaining agreement. There was no grievance procedure in place, so a time bar on the federal cause of action would preclude pilots from all avenues of relief.

The Fifth Circuit has held that when a claim alleges unfair representation, it is subject to *DelCostelio*'s six month limitations period even when it arises under the RLA, rather than the NLRA as was the case in *DelCostello.*[7] The claim also need not be a "classic" hybrid claim. The six month limitation period is applicable whenever there is a DFR claim.[8] Pilots have clearly alleged a breach of the duty of fair representation.

In addition, at least one other circuit has held explicitly that the limitations period should apply "equally to disputes arising from the process of negotiation and

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on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c).

[7] *Brock v. Republic Airlines, Inc.*, 776 F.2d 523, 525-26 (5th Cir. 1985) (The "six-month statute of limitations in § 10(b) of the [NLRA] controls hybrid actions brought under the [RLA]. Hybrid claims under either act originate from an identical implied duty of fair representation and involve a similar balancing of competing interests."); *see also Coyle v. Brotherhood of Ry., Airline & S.S. Clerks*, 838 F.2d 1404, 1405 (5th Cir.1988).

[8] *Richardson v. United Steelworkers of America*, 864 F.2d 1162, 1167 (5th Cir.1989); *see also Degan v. Ford Motor Co.*, 869 F.2d 889, 892-93 (5th Cir.1989).

to those arising from actions under the agreement resulting from the negotiations." [9] We agree that the rationale of *DelCostello* applies to the facts before us now. Thus pilots' labor law claims are subject to a six month statute of limitations.

In support of their second argument, pilots cite *United Parcel Service, Inc. v. Mitchell*,[10] for the proposition that state law provides the appropriate limitations period. *Mitchell* held that a state statute of limitations for vacation of an arbitration award rather than for breach of contract governed a similar suit. Two questions were left unanswered in *Mitchell*, however: (i) what statute of limitations should govern the action against the union (only the action against the employer was subject to the arbitration statute) and (ii) whether the statute of limitations should be borrowed from federal law, namely NLRA § 10(b), 29 U.S.C. § 160(b) rather than from state law. *DelCostello* resolved these unanswered questions holding that it was indeed appropriate to borrow from federal law and apply the six month statute of limitations from § 10(b). That limitations period applies to the claims against the employer and those against the union.[11]

In the pilots' third challenge to the trial court's ruling, they assert that the trial court should have applied the doctrine of equitable tolling to find that pilots' claims were not barred by the statute of limitations. Pilots argue that they didn't know of the fraud and collusion perpetrated upon them until less than six months before they filed suit. They do not, however, detail the fraud

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[9] *United Independent Flight Officers v. United Air Lines*, 756 F.2d 1262, 1271 (7th Cir.1985).

[10] 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981).

[11] *DelCostello*, 462 U.S. at 154-55, 103 S.Ct. at 2285-86, 76 L.Ed.2d at 482-83.

and collusion which kept this knowledge from them or what and how they found out about it.

Pilots begin by arguing that where fraud and collusion have been alleged, *DelCostello* is inapplicable and a two year statute of limitations set forth in the RLA applies.[12] *Brock v. Republic Airlines, Inc.*,[13] the only case pilots cite for this proposition, does not go nearly as far as pilots would take it. The RLA's statute of limitations applies only to actions arising under its own provisions; pilots have not alleged a violation of those provisions. The "fraud and collusion" Brock alleged denied him a fair hearing before the National Railroad Adjustment Board which issued the order Brock appealed.[14] Pilots do not appeal an Adjustment Board order, nor do they allege fraud and collusion in connection with such an order. In short, their claims fall entirely outside the parameters of *Brock*.

Even though *DelCostello* does apply, and not *Brock's* two year limitations period, pilots nevertheless argue that they meet the six month statute of limitations. Eight months after the DFR claim was dismissed, pilots moved for reconsideration of the dismissal arguing that the trial court had "apparently overlooked the doctrine of equitable tolling in its ruling."[15] Pilots argued that the statute should have been tolled until a time less than six months

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[12] 45 U.S.C. § 153 (First) (r), the section pilots claim is applicable, provides:

> All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

[13] 776 F.2d 523, 526-27 (5th Cir.1985).

[14] *Id.* Such a cause of action is specifically provided for in 45 U.S.C. § 153 (First) (p) and therefore subject to the two year limitation period established in 45 U.S.C. § 153 (First) (r).

[15] R. 1110.

before they filed suit because the defendants had fraudulently concealed the facts that gave rise to their cause of action. The trial court found that their motion had no merit because the issue was not adequately raised when the claims were initially disposed of and pilots failed to show a proper basis for the exercise of equitable tolling. We agree.

Allegations of fraudulent concealment do not free plaintiffs of their obligation to exercise reasonable diligence to discover frauds perpetrated against them once they are on notice that such acts might have occurred.[16] Plaintiffs' own affidavits submitted before the summary judgment and with the motion for reconsideration show they were on "inquiry notice" if not actual notice of the acts that form the basis of their DFR claim for much longer than six months before they filed suit.

For example, plaintiffs allege that Huttinger misrepresented that the Pilots' Agreement would be subject to ratification in July 1985; pilots knew by August 3, 1985 that the agreement was to be immediately implemented

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[16] *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir.1988), *reh'g granted in part* (unpublished opinion).

> [A]n act of concealment should not relieve the plaintiff of his duty to exercise reasonable diligence to discover the fraud . . . . Concealment by the defendant is only a factor to be considered in determining when the plaintiff should have discovered the fraud.
>
> The requirement of diligent inquiry imposes an affirmative duty upon the potential plaintiff . . . . A plaintiff who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed. (Citations omitted).

Although *Jensen* dealt with alleged securities fraud, is reasoning extends to this situation. Like investors, employees "are not free to ignore storm warnings" that would alert a reasonable employee to the possibility of fraud. *Id.*

without ratification.[17] Haffner, one of the pilots, was aware in July or August 1985 that Huttinger and ALPA had no alternative but to take the buyout. ALPA would not support the pilots through a strike because (i) ALPA was financially depleted and could not afford to do so and (ii) ALPA had been threatened with suit by TACA and ALPA's legal department felt they would lose.[18] In the spring of 1985, while negotiations were ongoing, Zyriek—another pilot—learned from a vice president of TACA that Huttinger was not qualified to represent the pilots and that Huttinger and Padgett were lying to the pilots about the course of the negotiations.[19]

At least some of the pilots were informed about the events taking place and potential problems with the negotiations. Many of the pilots also declared that they were aware of and asked by ALPA to participate in sabotage of TACA equipment. This alone should have put them on notice that things were not as they should be. Finally, *First Federal Savings and Loan Assoc. of Miami v. Mortgage Corp. of the South*[20] holds that ignorance of one aspect of an alleged fraud, where many other facts were known, is insufficient to delay the running of the statute.

Given these allegations, there is no question that the pilots were on inquiry notice of the labor law claims they raised in this suit in the spring or summer of 1985. Pilots have not alleged or provided any proof which would tend to show that defendants actively concealed their conduct or that the pilots exercised reasonable diligence, from that time until less than six months before

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[17] *See* Amended Complaint at ¶¶ 41-42, R. 495-96; ALPA's Statement of Material Facts Not in Dispute at ¶ 10, R. 571 and Pilots' Controverted Statements at ¶ 10, R. 727.

[18] Declaration of Bert Haffner, R. 1179-1181.

[19] *See* Declaration of Gary Zyriek, R. 1196-98.

[20] 650 F.2d 1376, 1378-79 (5th Cir.Unit B 1981).

they filed suit, in order to learn of their legal claims.[21] The trial court did not abuse its discretion in failing to grant reconsideration. No fact issues regarding the pilots' exercise of diligence in finding the grounds of their complaint were presented for resolution.

Pilots' fourth argument measures the actions of ALPA and TACA against an injunction. In 1983, El Salvador adopted a new Constitution which required Salvadoran public service companies to have their bases in El Salvador. Pursuant to that new requirement, TACA attempted to move its pilots base to San Salvador. ALPA immediately sought an injunction against the move which was granted by the district court and upheld by the Fifth Circuit.[22] The injunction did not prevent TACA from relocating its base. It simply provided that "TACA must relocate its pilot base, and effect the other intended steps in accordance with the substantive law and procedures set forth in the Railway Labor Act and other relevant domestic laws." [23] The pilots contend that TACA effected its move in violation of the RLA and thus is in violation of the injunction.

Pilots did not raise this issue until February 1987—long after they had filed this action. We find that the courts below acted properly in refusing to reopen that

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[21] *United Klans of America v. McGovern*, 621 F.2d 152, 153 (5th Cir.1980):

> Fraudulent concealment tolls the statute of limitations. To rely on this tolling doctrine, "plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim."

Citing In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1169 (5th Cir.1979).

[22] *See Airline Pilots Ass'n International, AFL-CIO v. TACA International Airlines, S.A.*, 748 F.2d 965 (5th Cir.1984), *cert. denied*, 471 U.S. 1100, 105 S.Ct. 2324, 85 L.Ed.2d 842 (1985).

[23] *Id.* at 972.

case. The issues involved in the old case and the current one are not substantially similar and the parties are different—only TACA was bound by the injunction. A transfer or consolidation to resolve this issue would have complicated the case—not simplified it.

Pilots' final argument against the operation of *DelCostello* and the bar of the six month statute of limitations is to classify the actions of ALPA and TACA as an improper attempt to decertify ALPA as the bargaining agent for the pilots. In this guise, pilots argue that the rationale of *DelCostello* is inappropriate.[24]

Disputes which involve the determination of the certified representative of airline employees in collective bargaining and contract administration are classified by the RLA as "representation" disputes. Such disputes are governed by Section 2, Ninth of the RLA,[25] which provides that "it is the duty of the [National Mediation] Board to investigate any dispute as to who is the collective bargaining representative of employees and to certify the organization properly designated." [26] We have no jurisdiction over this claim.

> The Act commits disputes involving a determination of who is to represent airline employees in collective bargaining to the exclusive jurisdiction of the National Mediation Board. A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims.[27]

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[24] Pilots do not explain why they believe this characterization makes *DelCostello* inapplicable, nor do they state which statute of limitations then becomes applicable or why. We respond to pilots' arguments without the need to answer these questions.

[25] 45 U.S.C. § 152, Ninth.

[26] *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Texas International Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir.1983).

[27] *Id.* at 161 (citations omitted).

In conclusion, we hold that pilots' labor law claims were time barred. A straight-forward application of *Del-Costello*, as it has evolved, compels this result. The remainder of pilots' arguments—equitable tolling, enforcement of a prior injunction, and wrongful decertification of ALPA—avail them not at all.

III. Erisa Claims

A. Did a "Plan" Exist Before April 18, 1985?

The fiduciary obligations created by Title I of ERISA apply only to established "plans." Section 401(a), 29 U.S.C. § 1101(a) (fiduciary responsibilities apply to employee benefit *plans*); Section 4(a), 29 U.S.C. § 1003(a) ("this subchapter shall apply to any employee benefit *plan* if it is established or maintained" by an employer, employee organization, or both) (emphasis added). Decisions as to whether or when to establish a plan, or how to design a plan, are not subject to any ERISA fiduciary obligation.[28] Nor does any fiduciary obligation arise during the negotiation or execution of an agreement regarding future pension benefits.[29] Thus, we must determine when the retirement plan for the TACA pilots went into effect, so that we can decide when any fiduciary duties may have been created.

A pension plan subject to ERISA is one which is "established or maintained by an employer or by an

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[28] *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573-76, 102 S.Ct. 1226, 1232-34, 71 L.Ed.2d 419 (1982); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336-38, 101 S.Ct. 2789, 2797-98, 69 L.Ed.2d 672 (1981); *United Independent Flight Officers, Inc. (UIFO-I)*, 756 F.2d 1262, 1266-69; *Moore v. Reynolds Metal Co. Retirement Program*, 740 F.2d 454, 456 (6th Cir.1984) *cert. denied*, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985).

[29] *UIFO-I*, 756 F.2d at 1268; *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274, 1280 (7th Cir.1985); *Sutton v. Weirton Steel Division of National Steel Corp.*, 567 F.Supp. 1184, 1201 (N.D.W.Va.), *aff'd*, 724 F.2d 406 (4th Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984).

employee organization or both" to provide retirement income to employees. Section 3(21)(A), 29 U.S.C. § 1002 (21)(A). ALPA cites *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*), for the proposition that a plan is "established" if, "from the surrounding circumstances a reasonable person could ascertain" the following four elements: "the intended [i] benefits, [ii] beneficiaries, [iii] source of financing, and [iv] procedures for receiving benefits." [30]

On February 2, 1982, ALPA and TACA entered a "Letter of Agreement" in which they agreed to establish a retirement plan for all TACA pilots. However, a formal retirement plan was not implemented until April 18, 1985, when TACA and ALPA executed the "TACA International Air Lines, S.A. Pilots' Retirement Plan and Trust" (the Plan). The 1982 "Letter of Agreement" provided that TACA would contribute $75,000 a year to a fund for the pilots' retirement plus a variable amount depending upon the number of pilots listed on the seniority list and whether a second B-737 aircraft was acquired. TACA's obligation to make monthly contributions commenced on March 31, 1982. "[U]ntil such time as the retirement plan for pilots has been established and implemented," TACA's contributions were to be deposited in an institution named by ALPA to be held in trust for the benefit of the retirement plan. "The "Letter of Agreement" was effective from February 25, 1982 to February 25, 1987, at which time the agreement would be subject to renewal.

Since the 1982 agreement did not describe the intended benefits or procedure for receipt of benefits, (although it does impart the source of financing and the beneficiar-

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[30] *Accord Rasmussen v. Metropolitan Life Ins. Co.*, 675 F.Supp. 1497, 1500 (W.D.La. 1987); *Ogden v. Michigan Bell Telephone Co.*, 657 F.Supp. 328, 332 n. 3 (E.D.Mich.), *appeal dismissed*, 829 F.2d 1126 (6th Cir.1987).

ies), ALPA argues that there was no plan until the signing of the 1985 retirement plan, which satisfies all four of the *Dillingham* requirements.[31]

Our opinion in no way undermines *Dillingham*'s holding that a plan is established if "from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Id.* at 1373. But in our case the issue is not *if* a plan has been established as in *Dillingham*, (because it is undisputed that an ERISA-covered plan was eventually established), but rather *when* the plan was established, taking into consideration the retroactivity provision in the 1985 retirement plan.[32]

ALPA also argues that the "circumstances" surrounding the February, 1982 Letter of Agreement, as reflected in its terms, prove that a plan was not established at that time. In particular, ALPA points to the following language of the 1982 Agreement to support its claim that a pension plan was to be created at some time in the future, and not by the 1982 Agreement itself: "the specifics of the retirement plan for the pilots *shall be* determined . . ."; TACA's contributions would be held in trust "*until such time as the requirement plan for pilots has been established and implemented*"; and "[a]t that time the Company's required monthly contributions

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[31] In *Dillingham*, an *en banc* Eleventh Circuit held that employers and unions that subscribed to a group insurance trust to furnish health insurance for employees or members, "established employee welfare benefit plans" for purposes of deciding subject matter jurisdiction over ERISA claims. *Dillingham*, 688 F.2d at 1374.

[32] Of course, this distinction can easily be collapsed by recognizing that a plan is normally established *when* all of the requirements for a plan are met. But the distinction is useful here because there is no contention that all of the requirements for a plan were met by 1985.

shall be made to the retirement plan for pilots." (Emphasis added by ALPA).[33]

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[33] The more complete version of relevant provisions of the 1982 Agreement are as follows:

LETTER OF AGREEMENT
between
TACA INTERNATIONAL AIRLINES, S.A.
and
THE AIR LINE PILOTS
in the service of
TACA INTERNATIONAL AIRLINES, S.A.
as represented by
THE AIR LINE PILOTS ASSOCIATION
INTERNATIONAL

THIS LETTER OF AGREEMENT is made and entered into in accordance with the provisions fo the Railway Labor Act as amended, by and between TACA INTERNATIONAL AIRLINES, S.A. (hereinafter referred to as the "Company") and the AIR LINE PILOTS in the services of TACA INTERNATIONAL AIRLINES, S.A. as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (hereinafter referred to as the "Association").

* * * * * *

1. The Company will fund a retirement plan for all pilots of the Company on the seniority list as of February 1, 1982 and any pilots added to the seniority list thereafter. The Company contributions to the plan shall be as follows:

(a) $75,000 per year, and

(b) an additional $25,000 per year when second B-737 aircraft is acquired by (i.e. owned by or leased to) the Company, and

(c) an additional $2,000 per year for each pilot on the seniority list in excess of fifty (50) pilots and

(d) all obligations coming due under clauses (a), (b), and (c) above will be paid by 12 payments 1/12 each such payments on the last business calendar day of the month and each such payments prorated to any increased obligation.

* * * * * *

5. The specific of the retirement plan for pilots shall be determined by the Association provided that the plan receives

We can ignore the implications of these terms in the 1982 Letter of Agreement, however, because the April, 1985 retirement plan is explicitly retroactive to February, 1982. The very first sentence of the 1985 retirement plan states that TACA "established a pension plan for its Pilots" on February 1, 1982.[34] The retirement plan unambiguously makes the plan's Effective Date as February 1, 1982.[35] All pilots employed on the Effective

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I.R.S. qualification and it treats all pilots in a fair and equitable manner.

6. The Company contributions required by Paragraphs 1 and 4 above shall be deposited in a trust account established in an institution to be named by the Association to be held in trust by that institution for the benefit of the retirement plan for pilots until such time as the retirement plan for pilots has been established and implemented. At that time the Company's required monthly contributions shall be made to the retirement plan for pilots.

* * * * * *

[34] Article 1.1 of the TACA INTERNATIONAL AIRLINES, S.A. PILOTS RETIREMENT PLAN AND TRUST provides:

Establishmen and Name of the Plan and Trust—TACA INTERTERNATIONAL AIRLINES, S.A., (hereinafter referred to as the "Company"), on February 1, 1982, established a pension plan for its Pilots, which, as it may be amended from time to time, is known as the TACA International Airlines, S.A. Pilots Retirement Plan and Trust.

[35] Article II—(Definitions) defines "Effective Date":

The term 'Effective Date' means February 1, 1982, the date on which the provisions of this Plan are effective.

Other provisions support the view that the 1985 Plan is retroactive to 1982. "Future Service" is defined as "a Pilots" aggregate period of employment as a Pilot on or after February 1, 1982, including approved leaves of absence and furloughs."

"Past Service" is defined as "a Pilot's aggregate period of employment as a Pilot prior to February 1, 1982, including approved leaves of absence and furloughs; provided, however, that a Pilot's total Past Service which may be credited under the Plan shall not exceed twenty (20) years."

"Plan Year" is defined as "the twelve (12) month period commencing each January 1st and ending on the following De-

Date are eligible to participate in the Plan.[36] We will not interfere with the intent of the parties to make the Plan effective on February 1, 1982. Thus, we instruct the court on remand to accept as a matter of law that the Plan was in effect on February 1, 1982.

B. Did TACA, ALPA and Huttinger Have Any Fiduciary Duties Under the Retirement Plan?

Finding a need for greater protection of employees covered by benefit plans, Congress enacted ERISA in 1974. 29 U.S.C. §§ 1001 *et seq.* In so doing, Congress sought to protect "the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans." 29 U.S.C. § 1001(c).[37] ERISA is therefore to be construed

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cember 31st. However, the first Plan Year shall commence February 1, 1982 and end December 31, 1982."

4.1 Company Contributions—The Company shall contribute to the Plan such amounts as shall be required by the Letter of Agreement between TACA INTERNATIONAL AIRLINES, S.A. and the AIR LINE PILOTS in the service of TACA INTERNATIONAL AIRLINES, S.S. as represented by THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL in effect as of February 24, 1982 and as subsequently amended or replaced, in accordance with the funding standards of the Internal Revenue Code and ERISA.

[36] However, one year of service is required before eligibility:

3.1 Eligibility—Each person who is employed as a Pilot on the Effective Date and who, as of the Effective Date, has completed one year of Past Service, shall participate in this Plan as of the Effective Date.

[37] Amending ERISA in 1986 with the Single-Employer Pension Plan Amendment Act, (SEPPAA) Title XI of Pub. L. No. 99-272, tit. XI, 100 Stat. 237 (1986), Congress declared that the policy of the legislation was "to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits." 29 U.S.C. § 1001b(c)(3) (Supp. VII 1989). Another declaration of policy under SEPPAA was "to pro-

liberally to safeguard the interests of fund participants and beneficiaries, and to preserve the integrity of fund assets. This court has previously held that a liberal construction of ERISA is in keeping with its remedial purposes.[38]

Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A), provides that a "person" is a fiduciary only "to the extent" he

> (1) exercises discretionary control or authority over the management of the Plan or the Plan's disposition of its assets, (2) renders investment advice with regard to assets of the plan, or (3) has discretionary authority or responsibility in the administration of the plan."

In *Sommers Drug Stores, Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1459-60 (5th Cir.1986), *reh'g den.*, 797 F.2d 977 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987), we held that "[t]he phrase 'to the extent' indicates that a person is a fiudciary [under ERISA] only with respect to those aspects of the plan over which he exercises authority or control."[39] The court below applied 3(21)(A) and *Sommers* to conclude that neither TACA nor ALPA had any fiduciary duties "because the 1985 retirement plan does not establish any

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vide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship." 29 U.S.C. § 1001b(c)(4) (Supp. VII 1989).

[38] *American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Society of the United States*, 841 F.2d 658, 662 (5th Cir. 1988); *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984).

[39] *Accord Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir. 1985); *Brandt v. Grounds*, 687 F.2d 895, 897 (7th Cir. 1982); *Holland v. Bank of America*, 673 F. Supp. 1511, 1518 (S.D. Cal. 1987).

power or authority on behalf of TACA or ALPA, nor has any such authority or power been demonstrated to have been exercised in fact." *Landry v. ALPA*, No. 86-3196, slip op. at p. 9 (E.D.La. Apr. 24, 1987) (mem.) A genuine issue of material fact [40] existed as to whether TACA, ALPA, and Huttinger had any fiduciary duties under ERISA that would make them liable for the wrongs alleged in the pilots' complaint.

Initially, we must emphasize that fiduciary status is to be determined by looking at the *actual* authority or power demonstrated, as well as the formal title and duties of the party at issue. As described in the legislative history of ERISA, "the definition [of 'fiduciary'] includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title." H.R.Conf.Rep. No. 93-1280, 93d Cong., 2nd Sess., *reprinted in* 1974 U.S.Code Cong. & Admin.News 4639, 5038, 5103. Thus "fiduciary" "should be defined not only by reference to particular titles such as "plan administrator," "committee chairman," or "sponsor," but also by considering the authority which a particular person or entity exercises over the employee benefit plan at issue. *Donovan v. Mercer*, 747 F.2d at 308. *See also Brink v. DaLesio*, 496 F.Supp. 1350, 1374-75 (D.Md.1980), *rev'd in part on other grounds*, 667 F.2d 420 (4th Cir.1982); *Leigh v. Engle*, 727 F.2d 113, 134 n. 33 (7th Cir.1984) ("we think ERISA directs courts to look beyond . . . formal authority with respect to the plan . . . to consider what real authority they had over plan investments . . .").

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[40] In a practice all too common in summary judgment decisions, the trial court made no mention of the standard it was applying to reach its decision. Assuming that the appropriate standard for a rule 56(c) motion was being tacitly applied, it would behoove the district court to spell out that "no genuine issues as to any material fact" could be found in support of plaintiff's case. F.R. Civ. P. 56(c). *See also*, S. Childress & M. Davis, *Standard of Review* 310 (Wiley & Sons 1986). Such judicial pedagogy might reduce the frequency of the same omission in briefs, motions, etc.

The fact that someone is a fiduciary under a retirement plan does not necessarily mean he is a fiduciary with respect to all of the obligations under the plan. As we stressed in *Sommers*, 793 F.2d at 1459, the key language in the statutory definition is that a person is a fiduciary "to the extent" he or she exercises control over the plan. The Secretary of Labor explained this language in a bulletin interpreting ERISA, which was published in the Code of Federal Regulations. In this bulletin, the Secretary was asked the following question and gave the following response:

> D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?
>
> A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3 (21) (A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. *However, their responsibility, and consquently, their liability, is limited to the selection and retention of fiduciaries* (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act). In addition, if the directors are made named fiduciaries of the plan, their liability may be limited pursuant to a procedure provided for in the plan instrument for the allocation of fiduciary responsibilities among named fiduciaries or for the designation of persons other than named fiduciaries to carry out fiduciary responsibilities, as provided in section 405(c) (2).

> The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(a)(3) of the Internal Revenue Code of 1954.

ERISA Interpretive Bulletin 75-8, 29 CFR § 2509.75-8 (1983) (emphasis supplied).

While the fiduciary duty of a board of directors is not directly at issue in our case, the excerpted dialogue from the bulletin illustrates the important parameters and limitations of fiduciary responsibility. Thus, it will be the task of the court on remand to determine precisely the extent, as a factual matter, of *actual* fiduciary authority *possessed* or *exercised* by ALPA, Huttinger, and TACA with respect to the wrongs alleged by the pilots. The pilots' complaint maintains the following four wrongs as a consequence of ERISA violations: [41]

> (i) delay in implementation of the retirement plan for three years; (ii) failure and refusal to discuss or disclose the Plan and its benefits to the Pilots upon repeated requests; (iii) failure to disclose the amount of contributions by TACA, where the funds were deposited, the type of investment account and interest rates the invested funds received; and (iv) collusion between TACA, ALPA, and FBA to allow Huttinger to receive benefits to which he was not legitimately entitled.[42]

1. Too Slow

Although, as we determined above, the Plan was in effect in February, 1982, a detailed retirement plan lay-

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[41] Of course, to the extent the district court allows the pilots to amend their complaint on remand pursuant to F.R. Civ. P. 15, this list of alleged wrongs may be expanded.

[42] FBA is only an intervenor in this appeal. See *infra*. The original Complaint alleged collusion between ALPA, FBA, and Huttinger. The amended Complaint, however, implicates TACA in this collusion to improperly provide Huttinger with funds.

ing out the rights and obligations of the parties was not implemented until over three years later.[43] In August of 1984, FBA was contacted by ALPA about a possible contract to perform retirement plan services. On October 30, 1984, a Plan Services Agreement was entered between ALPA and FBA delineating specific services that FBA would provide under the Plan. In this Plan Services Agreement, FBA agreed to take "all the steps required to make the plan and trust operative."

However, while FBA's duties under the Plan are retroactive to February, 1982, any fiduciary obligations undertaken by FBA in the Plan Services Agreement do not begin until October 30, 1984. Thus, assuming without deciding that FBA had a fiduciary duty to implement the Plan beginning on October 30, 1984, there is still a disputed fact issue as to which party had the responsibility to implement the Plan from February, 1982 until the signing of the Plan Services Agreement.[44] If the trial court on remand discovers that TACA, ALPA, or Huttinger formally possessed or actually assumed any fiduciary duty with respect to implementing the Plan, then they will be potentially liable for any damages resulting from the delay in implementation.

2. Didn't Show

The pilots' alleged that Charles Huttinger refused to discuss or disclose the Plan and details about its benefits despite repeated requests. Huttinger was appointed to the pilots' retirement committee which, according to sec-

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[43] In an inquiry filed with the U.S. Department of Labor, Division of Technical Assistance, Bert Haffner, one of the plaintiff TACA pilots, complained of an "unusual time delay and lapse from time of incepiton (1 Feb. 82) to the time of issuance of plan outline (16 April 85)." R. 1183.

[44] There is nothing in either the "Letter of Agreement" or the Plan itself that imposes a fiduciary duty to implement the Plan.

tion 12.4 of the Plan,[45] was charged with interpreting and construing the Plan, determining questions of eligibility and rights of participants and their beneficiaries, and providing guidelines for the plan administrator as required for the orderly and uniform administration of the Plan.

The affidavit of Bert Haffner, one of the TACA pilots, declares that Huttinger "refused to supply [him] with a copy of the retirement plan or tell [him] how to get one" despite repeated requests. R. 1179. In July or August of 1985, Haffner met with Huttinger at his home "in order to obtain his help in applying for all benefits [that he] might be eligible for." R. 1180. Haffner claimed that he "did this in accordance with recommendations in ALPA manuals, to contact the union chairman for help in applying for benefits." R. 1180.

Another pilot, Jules Corona, declared that despite numerous requests, he "was never given any information as to where the TACA contributed retirement funds were held in Trust, nor when the plan was implemented, nor any of the ERISA required disclosure information until after the August 1, 1985 termination date of the plan." R. 303.

Huttinger clearly assumed both a *de facto* and a *de jure* role in construing the Plan and informing the pilots about its contents. Thus, we find as a matter of law that Huttinger had a fiduciary duty to disclose information about the Plan to the pilots when asked. Whether he breached that fiduciary duty must be resolved on remand.

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[45] 12.4 *Retirement Committee*—In order to assist in the administration of the Plan, the Association shall appoint a Retirement Committee to:

(a) interpret and construe the Plan;

(b) determine questions of eligibility and of rights of Participants and their Beneficiaries;

(c) provide guidelines for the Plan Administrator, as required for the orderly and uniform administration of the Plan.

3. Couldn't Know

ALPA argues that it is not a fiduciary with respect to the alleged failure to disclose information about the Plan and its assets because the Plan charged the Plan Administrator, FBA, with the day-to-day administration of the Plan, and consistent with Section 101 of ERISA, 29 U.S.C. § 1021,[46] with specific responsibility for providing participants in the Plan with all information required by law, including information and reports regarding the Plan and its assets.[47]

However, while the responsibility for notifying beneficiaries and participants with Plan information formally fell upon FBA, there are indications that FBA's actual authority over Plan matters was (at least sometimes)

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[46] § 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022 (a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

[47] Formal responsibility to notify beneficiaries and participants about the Plan falls on FBA.

9.8 *Powers, Duties and Responsibilities of the Plan Administrator*—The specific powers and responsibilities of the Plan Administrator are to:

* * * * * *

(c) Prepare and arrange for delivery to Participants such summaries, descriptions, announcements and reports as are required to be given to Participants under applicable laws and regulations;

Our opinion decides nothing with respect to FBA. See *infra*.

subordinated to and dependent upon decisions by ALPA.[48] For example, when the president of FBA, Richard Watson, was asked why Huttinger was able to apply for and begin receiving benefits in November of 1985, but Haffner

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[48] The Plan plainly gives ALPA some fiduciary duties. Article 11.2 of the Plan gives ALPA the authority to terminate the plan and the trust by an instrument in writing signed by the president of ALPA or his designee for such purpose. R. 1389.

Article 11.2 provides:

> Termination of Plan and Trust—"This Plan and Trust may be terminated by an instrument in writing signed by the President of the Association or his designee for such purpose. Notwithstanding the foregoing, the Plan shall automatically terminate in the event of a complete discontinuance of contributions by the Company. Upon the termination or partial termination of the Plan, the rights of all affected Participants and Beneficiaries to benefits accrued to the date of such termination, partial termination of the Plan, the rights of all affected Participants and Beneficiaries to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, are nonforfeitable."

ALPA has the sole authority and control to remove and appoint the Trustee, the Plan Administrator and the Investment Manager.

> Article 9.5(a) provides: The Association is empowered to appoint and remove the Trustee, the Plan Administrator and the Investment Manager as it deems necessary for the proper administration of the Plan, to assure that the Plan is being operated for the exclusive benefit of the Participants and their Beneficiaries in accordance with the terms of this Agreement, the Internal Revenue Code and ERISA.

Article 9.5(c) explicitly provides for the discretion of ALPA:

> "The Association may in its discretion appoint an Investment Manager to manage all or a designated portion of the assets of the Plan. In such event, the Trustee shall follow the directives of the Investment Manager in investing the assets of the Plan managed by the Investment Manager. While there is an Investment Manager, the Association shall have no obligation under this Plan with regard to the performance or non-performance of the duties delegated to the Investment Manager."

was not allowed to do the same, Watson reportedly explained "that was the way ALPA had told him to do it." [49]

Even if the actual fiduciary duty to disclose information about the Plan falls upon FBA, its failure to notify Plan participants and beneficiaries may not constitute a breach of that duty because ALPA and TACA undertook an obligation to keep FBA informed about certain matters.[50] If ALPA failed to do so, FBA may have been prevented from fulfilling its fiduciary duty to notify the beneficiaries and participants.

Similarly, in the Plan, TACA agrees to supply "full and timely information to the Plan Administrator on all matters relating to the compensation of all Participants, their periods of service, their retirement, death, disability

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[49] Bert Haffner provided this information about his conversation with Watson. R. 1181.

[50] Sections 3 and 4 of the Plan Services Agreement provide in full:

> 3. *Obtaining Information*—The Association agrees to furnish information or data which FBA requests in order to perform services under this Agreement within 90 days of the initial request or FBA will not be held responsible for services under this Agreement. FBA reserves the right to require that data be furnished over the signature of an authorized official of the Association or the entity or representative providing the data on behalf of the Association.
>
> FBA reserves the right to reject information or data which it considers unsuitable for processing. FBA's sole responsibility, in this regard, shall be to forward questionnaires and forms as necessary to the Association on a timely basis, enabling the Association to provide the information needed.
>
> 4. *Liability for Information*—The Association shall provide complete, accurate and timely information, upon which information FBA may rely fully. The Company and the Association shall indemnify and hold FBA harmless for errors, omissions, and inaccurate or incomplete reports completed, based on inaccurate, incomplete or untimely information furnished by the Company and the Association.

or termination of employment, and such other pertinent facts as [FBA] may require." [51] However, any fiduciary duty on the part of TACA arising under § 9.9 (or any other section) of the Plan is unenforceable, because TACA is neither a signatory nor a party to the Plan.[52]

The trial court on remand must determine the actual fiduciary duties assumed by ALPA and TACA with respect to providing FBA and the Plan beneficiaries and participants with information under the Plan.[53]

4. Where'd the $ Go?

A genuine issue of material fact exists as to whether TACA and ALPA colluded with Huttinger in order to provide him with retirement benefits. As discussed *supra*,

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[51] Plan § 9.9 provides:

> 9.9 *Information From Company*—To enable the Plan Administrator to perform his functions, the Company shall supply full and timely information to the Plan Administrator on all matters relating to compensation of all Participants, their periods of service, their retirement, death, disability, or termination of employment, and such other pertinent facts as the Administrator my require; and the Administrator shall advise the Trustee and the Investment Manager of such of the foregoing facts as may be pertinent to their duties under the Plan. Subject to Section 9.2, all fiduciaries may rely upon such information as is supplied by the Company and shall have no duty or responsibility to verify such information.

[52] Merely because TACA was not a party to the Plan does not preclude a finding that TACA was a fiduciary with respect to the Plan. If further facts discovered on remand reveal that TACA undertook actual obligations to notify in accordance with § 9.9 of the Plan, then TACA will be a fiduciary to that extent. *See* Section *II.B.4. Where's the $ Go?*

[53] In a memorandum responding to ALPA's motion to dismiss, FBA, a defendant below, admitted that "[a] factual determination is required to determine whether those disclosures [pertaining to the Plan] were made." FBA also asserted: "Factual determinations abound in the delegation issue, pretermitting summary judgment on that basis." R. 1191.

Frank Landry declared in an affidavit that each party to the alleged collusion was motivated by different factors. According to Landry, TACA threatened civil suit and criminal prosecution against ALPA for the intentional damage of TACA's engines by some of the ALPA pilots.[54] In return for ALPA's accepting the 1986 Pilots' Agreement, TACA agreed not to carry out this threat. TACA, meanwhile, would be able to move its pilot base to El Salvador and avoid its obligations under the Plan.

Landry further claimed that Huttinger was offered benefits to which he would otherwise not have been entitled as an incentive for him to vote against the pilots' interests. If such collusion did occur, then TACA, ALPA, and Huttinger are implicated as fiduciaries under 3(21)(A) because they would have exercised actual control over the disposition of the assets of the Plan. In other words, by alleging colluding to provide Huttinger with retirement benefits, ALPA, TACA, and Huttinger *became* fiduciaries over the distribution of Plan funds, even if they are not listed as fiduciaries with respect to that function.

C. Breach of Fiduciary Duties

Plan fiduciaries are statutorily prohibited from dealing with Plan assets in their own interest.[55] Moreover, the

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[54] These allegations are discussed more fully in the RICO section, *infra*.

[55] § 1106. *Prohibited transactions*

* * * * * *

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or repre-

Plan fiduciaries agreed to "discharge [their] duties solely in the interest of the Participants and their Beneficiaries" and to act "for the exclusive purpose of providing benefits to Participants." [56] To the extent that ALPA and TACA

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sent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan. 29 U.S.C. § 1106 (b).

[56] Article 9.2 provides in relevant part:

General Fiduciary Duties—Each Plan fiduciary will discharge his duties solely in the interest of the Participants and their Beneficiaries and act: (a) for the exclusive purpose of providing benefits to Participants and their Beneficiaries and defraying reasonable expenses of administering the Plan; (b) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . No Plan fiduciary shall engage in any transaction prohibited under ERISA, the Internal Revenue Code, or any other law."

This Plan language follows the terms of the ERISA provision on the standard of care for fiduciaries:

§ 1104. *Fiduciary duties*

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

colluded with Huttinger to provide the latter with Plan benefits, so that the former could serve their own interests, fiduciary duties were breached under § 1106(b).

Moreover, we must stress that although *Sommers* limited the liability of fiduciaries by the "to the extent" language of § 3(21)(A) this limitation does not apply to § 1105(a).[57] To illustrate, even if ALPA is only found to be a fiduciary "to the extent" of appointing and removing the Plan administrator and Trustee,[58] ALPA may still be liable, for example, for the breaches of FBA if ALPA "partcipat[ed] knowingly in, or knowingly undert[ook]

(C) by diversifying the investment of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1104(a).

[57] 1105. *Liability for breach of co-fiduciary*

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a).

[58] This example is only an illustration to assist the trial court on remand; it reaches no conclusions.

to conceal, an act or omission of [FBA], knowing such act or omission [was] a breach." § 1105(a)(1).

D. Status of FBA

The pilots' case against FBA is still pending in the district court. FBA has moved for summary judgment against the pilots' claims, but the trial court has decided the motion.[59] Although the decision appealed herein does not directly address FBA's fiduciary status or liability, FBA has filed an intervenor brief seeking to protect its interest in the litigation. Basically, FBA appears to be concerned that since the trial court found that TACA and ALPA were not fiduciaries, and dismissed the claim against Huttinger, the only party remaining upon which fiduciary duty can be imposed is FBA.

Thus, in its intervenor brief FBA argues that a determination of whether TACA or ALPA acted in accordance with the fiduciary provisions of ERISA is neither necessary nor relevant. FBA asserts that allegations of improper plan termination do not raise any ERISA issues—but rather involve the RLA—since plan termination is a mandatory subject of collective bargaining under the RLA. FBA also claims that the Plan should be placed into trusteeship by voluntary action of the Pension Benefits Guarantee Corporation (PBGC).

FBA's arguments are unconvincing. The ERISA claim against ALPA and TACA on which the Court below ruled —the only ERISA ruling before us on appeal—only concerned action taken *prior* to Plan termination. Because the District Court's ruling properly confined itself to the claims before it, and did not address any ERISA claim related to Plan termination, there is no ERISA "finding"

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[59] In expectation of an appellate opinion that would be forced to explicitly or implicitly discuss the fiduciary status and liability of FBA, the trial court may, wisely, be waiting for our decision before ruling on FBA's motion for summary judgment. An obvious possibility is to consolidate this remanded action with the FBA action.

related to Plan termination which we could reverse. FBA's request actually asks us to become a fact-finder *ab initio*, a role which does not properly rest with this Court. *Booker v. School Dist. No. 1*, 585 F.2d 347, 353 (8th Cir.1978) ("function of the appellate court is not to make an initial decision [on factual issues] but simply to review the action of the trial court."), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 878 (1979).

Moreover, arguments by FBA that it should initiate proceedings agaainst PBGC for ancillary relief under the insurance guaranty provisions of ERISA are not relevant to the issue of whether TACA, ALPA, or Huttinger had any fiudciary duties under the Plan. An August 10, 1988 letter from the PBGC to the president of FBA stated that the notification given to the pilots was insufficient, and that the Plan was an ongoing plan until properly terminated. According to the PBGC letter, TACA is required to meet the minimum funding standards under § 302 of ERISA and § 412 of the Internal Revenue Code as long as the Plan is ongoing. Thus, while the pilots may ultimately choose to seek relief from the PBGC, FBA cannot force it to take this approach.

In sum, when summary judgment was granted on the ERISA claims, the record contained disputed issues of material fact regarding the fiduciary status of the defendants with respect to the wrongs alleged in the complaint. We remand to the trial court for a determination not inconsistent with this opinion.

IV. RICO CLAIMS

In their amended complaint, pilots sought treble damages from TACA, ALPA and Huttinger under two subsections of RICO.[60] We must determine whether TACA,

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[60] 18 U.S.C. § 1962. Prohibited Activities:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt

ALPA, and Huttinger showed there were no genuine issues of material fact concerning the existence of (i) a RICO *person*, (ii) predicate acts of *racketeering activity*, (iii) a *pattern* of racketeering activity, and (iv) an *enterprise*.[61] The absence of a fact issue regarding any one of these elements is sufficient to grant summary judgment provided the legal analysis also favors the movants.

The trial judge granted summary judgment against the pilots. In brief, he found that if any predicate acts occurred, they took place before the alleged RICO enterprise came into being. Additionally, none of the alleged predicate acts were found sufficient for the RICO claim.[62] The trial court did find that a "pattern" of racketeering activities was alleged,[63] but held that there was no enterprise

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to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[61] *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir.1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989) ("Reduced to its three essentials, a civil RICO claim must involve: (1) a *person* who engages in (2) a *pattern of racketeering activity* (3) connected to the acquisition, establishment, conduct, or control of an *enterprise*."); *see also Gray v. Cauble*, 849 F.2d 946, 949 n. 7 (5th Cir.1988) (test for § 1962(c)); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1280, 79 L.Ed.2d 684 (1984) (test for § 1962(a)-(c)).

[62] For the specifics as to the trial court's disposition of each of the alleged predicate acts, *see infra* Part IV. B.

[63] In making this ruling, the trial court was constrained by *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir.1985), although it made an effort to show why no pattern should be found in this circumstance.

because plaintiffs failed to allege the appropriate "continuity" under either of its enterprise theories.

Our review of a grant summary judgment is *de novo*.[64] The standards for granting or denying summary judgment are well known.

> The party seeking summary judgment bears the exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. . . . In assessing whether the movant has met this burden, the courts should view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion. . . . All reasonable doubts about the facts should be resolved in favor of the non-moving litigant. . . . A court must not decide any factual issues it finds in the record, but if such are present, the court must deny the motion and proceed to trial. . . . If reasonable minds might differ on the inference arising from undisputed facts, then the court should deny summary judgment.[65]

Appropriate summary judgment evidence consists of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." F.R.Civ.P. 56(c). The affidavits must be made on "personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." F.R.Civ.P. 56(e). Finally, once the movant has made and supported its motion as provided in this

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[64] *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1030 (5th Cir. Unit B 1982) ("In reviewing a decision granting or denying summary judgment, this court applies the same legal standards as those that control the district court in determining whether summary judgment is appropriate.") (Citations omitted).

[65] *Id.* at 1031 (citations omitted).

rule, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.*

A. The RICO Persons

The Fifth Circuit recently clarified the definition of the RICO "person"—the defendant—in *Delta Truck & Tractor, Inc. v. J.I. Case Co.*: [66]

> If we are to restrict RICO to the type of conduct Congress intended to proscribe, the RICO person must be either one that poses or has posed a continuous threat of engaging in acts of racketeering. . . . The continuous threat requirement may not be satisfied if no more is pled than that the person has engaged in a limited number of predicate racketeering acts.

We are faced here with three RICO defendants and two theories of the enterprise [67] which configure them in different ways.

1. Association-in-fact Persons

Under pilots' "association-in-fact" enterprise theory, Huttinger, ALPA and TACA formed or acted as an enterprise, whose alleged purpose was to move the TACA pilot base, end ALPA's representation of the TACA pilots, ensure Huttinger's retirement benefits and ultimately deprive the pilots of their rights under the collective bargaining agreement. Under this enterprise theory all three could be RICO defendants. According to pilots' allegations and affidavit evidence, those goals have

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[66] 855 F.2d 241, 242 (5th Cir.1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989).

[67] Pilots' two enterprise theories are discussed in detail, *infra*, Part IV.D.

been accomplished, so the enterprise no longer exists.[68] There are no RICO defendants under this theory.

2. ALPA-as-Enterprise Persons

The pilots' other enterprise theory regards ALPA as a lawful enterprise which was the vehicle for racketeering activities perpetrated by TACA and Huttinger. Under this theory, ALPA cannot be a RICO person—or defendant—for the § 1962(c) violation because in such a situation, "the 'person' and the 'enterprise' must be distinct."[69] The rationale for this distinction comes from the language of the statute which deals with a "person employed by or associated with any enterprise." 18 U.S.C. § 1962(c).[70] This language shows that Congress intended for the RICO person and the enterprise to be separate entities.

It would be incongruous here to find that while ALPA, as the enterprise, cannot be a RICO person, it can be held vicariously liable for the acts of Huttinger. If this were the rule, all legal enterprises could be found liable under RICO if their employees or agents were involved in perpetrating predicate acts through or against them. This is contrary to the rule Congress meant to impose as evidenced by the language of the statute. ALPA is thus not appropriately a defendant under this legal enterprise theory for purposes of the § 1962(c) violation, either as a RICO person or vicariously.

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[68] This is discussed in detail in Part IV.D., *infra*.

[69] *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir.1986); *see also Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987).

[70] The Fifth Circuit has adopted the rationale of the Seventh Circuit in this regard. *See Haroco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 400 (7th Cir.1984), *aff'd* 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

ALPA can be both the enterprise and a RICO defendant for the § 1962(b) violation. In contrast to the language of subsection (c) which "requires a *relationship* between the 'person' and the 'enterprise,' subsection[. . .] (b) require[s] only the *use* of an 'enterprise' by a 'person.'" [71] Thus the RICO person and the enterprise need not be distinct for a person to be held liable under subsection (b). A finding of vicarious liability on the part of an enterprise which derived benefit from its representative's wrongful acts is also consistent with this view.[72]

The continuing threat requirement must still be met. For purposes of the alleged subsection (c) violation, only TACA and Huttinger could be defendants. Pilots have not alleged that TACA constitutes or has constituted a continuing threat—it is not a RICO person. A fact issue exists as to whether Huttinger poses a continuing threat resulting from his receipt of retirement benefits. This turns on the fact issue which we find to exist, as to whether the receipt of these benefits constitutes mail fraud.

For purposes of the subsection (b) violation, pilots have alleged that ALPA poses a threat of continuing harm to other victims. As an example, they cite a suit against ALPA by Continental Airlines pilots making much the same allegations as the TACA pilots: ALPA sold them out to protect itself from prosecution for the acts of sabotage it directed. This allegation is unrefuted by any summary judgment evidence. Thus the allegation that ALPA poses a continuing threat of engaging in racketeering activities remains to be resolved. Likewise there is a fact issue as to whether Huttinger's receipt of retirement benefits is a continuation of racketeering

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[71] *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir.1987), *cert. denied*, —— U.S .——, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989).

[72] *Id.*

activity. Again, TACA is not a RICO person for purposes of this violation.[73]

B. Racketeering Activity [74]

1. The Extortion Claim

As one of the predicate acts of racketeering activity, the pilots claimed thta TACA, ALPA and Huttinger committed extortion in violation of Louisiana state law [75] and 18 U.S.C. § 1951.[76] In support of these claims, the pilots alleged that Padgett, at the direction of Huttinger and ALPA, committed acts of sabotage against TACA aircraft and equipment to coerce concessions during negotiation of the collective bargaining agreement.

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[73] Although we have found that TACA is not appropriately a RICO person—or defendant—for any of the alleged RICO violations, pilots' allegations of TACA's past wrongdoing will frequently be discussed in the remainder of this season. We will explain the effect of TACA's status where appropriate.

[74] Racketeering activity is defined in relevant part as: (A) state law felonies; (B) acts indictable under several sections of 18 U.S.C. relating to, e.g., bribery (§ 201), embezzlement from pension and welfare funds (§ 664), mail fraud (§ 1341), wire fraud (§ 1343); (C) acts indictable under sections of 29 U.S.C. including violations of restrictions on payments and loans to labor organizations (§ 186) and embezzlement from union funds (§ 501(c)); and (D) offenses involving fraud under Title 11, in the sale of securities, etc. 18 U.S.C. § 1961(1).

[75] The particular provision of Louisiana state law that was violated is not specified in the RICO case statement or the trial court's opinion.

[76] 18 U.S.C. § 1951 Interference with commerce by threats or violence. "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

We agree with the trial court that these acts may not properly be considered predicate acts. The pilots did not allege that these extortionate acts were committed in the establishment or conduct of the affairs of an enterprise. If anything, they could only have been hostile to the goals of an alleged enterprise of which TACA and ALPA were both members.[77] Finally, the acts of sabotage are not actionable because the pilots did not allege or show that they sustained any injury as a result.[78] In fact, the sabotage, under the theory advanced by pilots, was intended to provide the pilots with an advantage in the form of bargaining concessions. It was not intended to deprive them of any rights.

2. The 29 U.S.C. § 186 Violation

The pilots alleged that ALPA made illegal payments to a labor official in violation of 29 U.S.C. § 186, which is section 302 of the LMRA.[79] In support of their claim,

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[77] This claim could not properly be raised under the ALPA-as-Enterprise theory in connection with the § 1962(c) claim since ALPA is not properly a defendant for that claim. *See supra* notes 68-70 and accompanying text.

[78] *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1985) ("*Any* injury to business or property caused by a violation of 18 U.S.C. § 1962(c) is sufficient.) (Emphasis added). The Fifth Circuit derived this rule from *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495, 105 S.Ct. 3275, 3284, 87 L.Ed.2d 346, 358 (1985), which held,

> If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).

[79] 29 U.S.C. § 186 provides:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or

they provide the following facts. Huttinger suffered from a disability which prevented him from flying. The result of this should have been his removal from active status in late 1984, five years after he became disabled. Once removed from active status, he would not have been entitled to sick leave, to be on the priority list, or to represent ALPA in its negotiations with TACA. Yet Huttinger stayed on the seniority list, received sick leave benefits, represented ALPA in its negotiations with TACA, and received a $26,000 severance payment.

There is no factual issue to be resolved regarding these allegations for two reasons. First, ALPA has produced affidavits and documents that we find establish as a matter of law that under its constitution and by-laws, Huttinger was properly on the "active" status list and therefore entitled to all the privileges of ALPA membership including the right to vote and hold office. Since the pilots presented no evidence to rebut this, ALPA has shown the absence of a material fact issue in this re-

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(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

spect. Second, the LMRA makes it illegal for an employer to pay or lend money to a union that represents its employees and for the union to receive or demand such payments. However, the LMRA excludes from coverage RLA employers and employees.[80] Airlines and airline pilots come under the RLA.[81]

In response to the seemingly conclusory statutory disposition of this issue, pilots raise a subtle argument. Their theory is that TACA, ALPA, and Huttinger contractually converted themselves from RLA to LMRA coverage through the agreement by which TACA was relocated to El Salvador and the pilots were terminated. The district court rejected this argument, finding that TACA was not relieved of RLA obligations until September 1, 1985 which was after any enterprise that may have existed was dissolved. We agree that TACA was an RLA employer when the alleged LMRA violations occurred. Although TACA is not a RICO defendant, we must reach this issue to determine the status of Huttinger and ALPA, who were likewise subject to the RLA. Thus no predicate racketeering act is stated.

3. The Mail and Wire Fraud Claims

The pilots have described four acts which they allege constituted mail fraud and therefore predicate acts for RICO. (1) On July 3, 1985 Huttinger wrote the pilots to say negotiations between ALPA and TACA had broken down. He said that regardless of the outcome of the negotiations, TACA would have to contribute to the pension plan. TACA has not continued its contributions to the plan. (2) On July 24, 1985 Huttinger sent a letter and telegram to the pilots saying that TACA and ALPA had reached an agreement "subject to ratification." Pilots were not given the chance to ratify the agreement. (3)

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[80] 29 U.S.C. §§ 142(3), 152(2), (3); *see also United States v. Davidoff*, 359 F.Supp. 545, 547-48 (E.D.N.Y.1973).

[81] 45 U.S.C. § 182.

On August 3, 1985 TACA sent a letter to the pilots informing them that ALPA had agreed to the relocation of the pilot base to El Salvador. The pilots were given twelve days to decide to leave TACA and take severance pay or to move themselves and their families to El Salvador. This communication did not inform the pilots that their retirement fund would be terminated or that they needed to take certain actions to protect their eligibility to receive benefits. Pilots later learned that they had lost their right to receive benefits. (4) The pilots allege that illegal payments of severance pay and retirement benefits were made and are being made by mail to Huttinger in furtherance of the scheme to defraud the pilots.

The trial court disregarded the final allegation (No. (4)) on the grounds that it had not been pleaded with sufficient particularity to withstand F.R.Civ.P. 9(b).[82] It apparently found that the other allegations of mail fraud were insufficient, based upon its general finding that the alleged acts predated any possible enterprise.

We disagree with the trial court's characterization of the timing. These alleged acts of mail and wire fraud occurred during the negotiation process. ALPA was continuously in existence throughout this time so any acts that occurred or were alleged took place during the existence of the "ALPA-as-enterprise" enterprise.

The crime of mail fraud is committed when the mails are used as part of a scheme or artifice to defraud.[83] The

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[82] This is discussed *infra; see* text accompanying notes 92-93.

[83] 18 U.S.C. § 1341. Frauds and Swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes

elements of mail fraud as a predicate offense for civil RICO purposes are:

> (1) A scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representation or promises.
>
> (2) Interstate or intrastate use of the mails for the purpose of furthering or executing the scheme or artifice to defraud.
>
> (3) The use of the mails by the defendant connected with the scheme artifice [sic] to defraud.
>
> (4) Actual injury to the business or property of the plaintiff.[84]

The mail fraud statute proscribes two different offenses. The first is acting pursuant to a scheme or artifice to defraud. The second is acting pursuant to a scheme or artifice for the purpose of obtaining money or property by means of false or fraudulent pretenses, representations or promises.[85] Plaintiffs have alleged both types of schemes in this case.

> or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[84] 1 D. McCormack, *Racketeer Influenced Corrupt Organizations* 4-46 - 4-47 (Knowles Law Book Publishing, Inc. 1989).

[85] *Id.* at 4-47, *citing, United States v. Margiotta*, 688 F.2d 108, 121 (2d Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983) ("The prohibition against schemes or artifices to defraud is properly interpreted to be independent of the clause 'for obtaining money or property.'") (Citations omitted); *see also United States v. Townley*, 665 F.2d 579, 585 (5th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982); *McLendon v. Continental Group, Inc.*, 602 F.Supp. 1492, 1507 (D.N. J.1985).

First, they allege that TACA and Huttinger operating through and with the enterprise ALPA, schemed to achieve the relocation of TACA's pilot base to El Salvador.[86] Each of the participants had individual motivations for wishing the achievement of this end, but they all required the success of this common goal. In order to achieve their end, TACA, ALPA and Huttinger participated in a scheme to defraud the pilots of their jobs and pension benefits.[87] Reading the facts in the light most favorable to the pilots, the following steps could have occurred as part of this plan to defraud. The pilots were sent letters telling them that the plan would not be touched and was not a subject of the negotiations between TACA and ALPA. They were told that the agreement ultimately reached was "subject to ratification." They were not told that the agreement which was reached, and which actually did not require ratification by the membership, terminated their pension benefits at the time they had to

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[86] The pilots also alleged that the association-in-fact enterprise of ALPA, TACA, and Huttinger, which we find did not exist, had this goal.

[87] The pilots have sufficiently alleged an intent to defraud, but even in the absence of such a showing, the intent to defraud is imputed to civil RICO defendants who act with reckless indifference to the truth or falsity of their representations. *United States v. Frick*, 588 F.2d 531, 536 (5th Cir.), *cert. denied*, 441 U.S. 913, 99 S.Ct. 2013, 60 L.Ed.2d 385 (1979); *see also United States v. Love*, 535 F.2d 1152, 1158 (9th Cir.), *cert. denied*, 429 U.S. 847, 97 S.Ct. 130, 50 L.Ed.2d 119 (1976); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir.1979). If the misrepresentations, omissions and false promises alleged here were not intentional, then they were certainly reckless. The RICO defendants correctly state that under the mail fraud statute, the determination of what constitutes fraud is left largely to outside sources of law. *Parr v. United States*, 363 U.S. 370, 389, 80 S.Ct. 1171, 1182, 4 L.Ed.2d 1277, 1289 (1960). They are incorrect, however, in their position that such fraud must be found in the pilots' DFR, ERISA, LMRA, or conversion claims. Clearly the state common law of fraud may provide a source of substantive law and the allegations are sufficient to support such a claim having been made.

decide between quitting (for severance pay) and relocating to El Salvador.

These misrepresentations, omissions[88] and false promises may have initially lulled the pilots into inaction. Based on these communications, they thought that Huttinger and ALPA were protecting their interests and they had no reason to question the system. Pilots allege that this correspondence ultimately had the effect of defrauding them of their jobs and pension benefits. TACA was able to relocate; ALPA was not prosecuted and was able to drop its representation of the TACA pilots; Huttinger received severance and retirement benefits. Only the pilots lost out. The intentional misrepresentations and omissions could have created a valuable undue advantage for TACA, ALPA and Huttinger[89] and thus constituted a scheme or artifice to defraud.[90]

Additionally, the defendants allegedly sought to obtain money or property by means of false or fraudulent pretenses, representation or promises. These are seen in their asserted motivations for their common goal of effecting the relocation and the benefits each received as a result. ALPA would save money by ridding itself of a small, yet costly, local union. It would also avoid the expense of defending against civil cases and criminal charges based on its alleged sabotage of TACA's planes. Huttinger would gain his severance pay and pension benefits.[91]

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[88] *See United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979) (both communication of half truths and concealment of material facts are actionable under the mail fraud statute).

[89] Although we have referred to TACA's goals and the benefits it received, they are not necessary. The fact issues with regard to ALPA and Huttinger are sufficient to state the claim.

[90] *United States v. Rasheed*, 663 F.2d 843, 849 (9th Cir.1981), *cert. denied*, 454 U.S. 1157, 102 S.Ct. 1031, 71 L.Ed.2d 315 (1982).

[91] Because he retired at the appropriate time, Huttinger qualified for pension benefits. However, the pension plan was underfunded

Only ALPA has controverted the goals, outlined above, which pilots have asserted. In an unchallenged affidavit ALPA has stated that the cost of representing the TACA pilots was not a factor in its negotiating strategy or posture. We point out that ALPA has *not* said exactly what it was trying to accomplish on behalf of the pilots. ALPA also has not denied that it was threatened with criminal prosecution and civil damage suits. In light of the remaining undisputed facts and the inferences therefrom, we find that mail fraud has been sufficiently alleged to create genuine factual issues regarding predicate acts of racketeering activity.

We also disagree with the trial court's disposition of the allegations of mail fraud in connection with Huttinger's receipt of pension benefits. F.R.Civ.P. 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." However, Rule 9(b) is read in connection with F.R.Civ.P. 8 which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." [92] The pilots have certainly

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and could not afford to pay full benefits to all the pilots eligible for retirement under the plan. Thus, one could infer from the undisputed facts that once Huttinger began receiving payment under the plan, or realized he could qualify for benefits and preempt any other pilots from doing so, he had an incentive to provoke the relocation, thereby denying the other pilots the opportunity to prove their eligibility.

Even before he began to receive retirement payments, Huttinger had an incentive to keep the pilots in ignorance of the effect a termination would have and of their rights under the plan. As chairman of the pension committee, he was in the perfect spot to have all the information needed to protect his interest and at the same time to know what information he should not disseminate in order to protect that interest against diminution by the claims of all the eligible pilots.

[92] F.R.Civ.P. 8(a)(2); *see Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 n. 20 (2d Cir.1979), *cert. denied*, 446 U.S. 946, 100 S.Ct. 2175, 64 L.Ed.2d 802 (1980) ("The requirement of particularity

pleaded sufficient facts to put the defendants on notice of their claim with regard to Huttinger's receipt of pension benefits. As early as the Original Complaint,[93] the pilots alleged that Huttinger had breached his duty of fair representation, a fiduciary duty, by agreeing to the structuring of the termination agreement in such a way that Huttinger's pension would be funded, but no one else's. Additionally, in the amended complaint, the pilots alleged that Huttinger applied for and is receiving pension benefits and that this was in connection with the scheme to defraud the pilots.

Finally, in the RICO Case Statement, the pilots spent a great deal of time detailing their factual allegations regarding Huttinger's receipt of pension funds. They alleged, in pertinent part, that Huttinger and ALPA bargained away TACA's obligation to continue funding the pension plan in return for TACA's agreement not to bring civil or criminal charges against ALPA for the acts of espionage described, *supra*. Huttinger was aware that this left the plan underfunded and that not all pilots would be able to receive their pension benefits. The pilots claimed that Huttinger intentionally failed to inform them of their right to apply for early retirement or of the fact that if they did not apply for benefits prior to the termination of funding, they would not be entitled to receive any benefits. Thus, the pilots argued that, in manifest abuse of his fiduciary position, Huttinger as-

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does not abrogate Rule 8, and it should be harmonized with the general directives . . . of Rule 8 that the pleading should contain a 'short and plain' statement of the claim or defense and with each averment should be 'simple, concise and direct.' Rule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matter.") (Citations omitted).

[93] The claims alleged in the original complaint were dismissed before the RICO claim was addressed by the trial court. The factual allegations contained in the Original Complaint are relevant to the RICO claim, however, because the Amended Complaint incorporates them all by reference.

sured himself of his own benefits by keeping those he represented in the dark. We cannot conceive of how the defendants failed to be put on notice of the claim with the amount of detail that was provided. We find that the pilots have alleged with particularity the defendants' acts which they contend amount to fraud.[94]

4. Violation of 18 U.S.C. § 664 [95]

Pilots allege that Huttinger's receipt of retirement benefits is a violation of 18 U.S.C. § 664. The trial court did not address this issue, finding that pilots had not pleaded the issue in its Original or Amended Complaints. We disagree, finding the allegation at Paragraph 39 of the Amended Complaint where pilots said: "On information and belief, . . . TACA and Charles J. Huttinger converted money and funds of the TACA pilot's employee benefit plan for their own uses." Additionally, the trial court found that pilots had adduced no evidence on this claim since the only relevant affidavit was not based on personal knowledge. We deal with this finding below.

Pilots have not directly shown, by affidavit or otherwise, what acts constituted conversion, who committed these acts, when the acts were done, or by whom. However, it is clear, in connection with pilots' other factual allegations, that they are referring to Huttinger's receipt of retirement benefits.

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[94] *See Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986).

[95] 18 U.S.C. § 664 Theft or embezzlement from employee benefit plan:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

The Ninth Circuit dealt extensively with § 664 liability in *United States v. Andreen*, 628 F.2d 1236 (9th Cir. 1980). The terms in the statute are to be given their traditional meanings. Thus, "[t]he concept of unlawful conversion encompasses the use of property, placed in one's custody for a limited purpose, in an unauthorized manner or to an unauthorized extent." [96] Embezzlement "encompasses the fraudulent appropriation of the property of another by one in lawful possession thereof." [97] The statute encompasses more than traditional embezzlement and unlawful conversion, however, and imposes liability for intentional breaches of special fiduciary duties imposed by other statutes or the instruments governing the trust.[98]

The RICO defendants argue that pilots have not stated a predicate act here because they have shown neither scienter,[99] nor that Huttinger's receipt of pension benefits was "substantially inconsistent with the fiduciary purposes and objectives of the . . . pension plan, as set forth by statutes, bylaws, charters, or trust documents which govern uses of the funds in question." [100]

We state once again that pilots' burden in response to the motions for summary judgment was not to prove its case, but to show the existence of genuine and material fact issues regarding its essential elements. The RICO defendants have not produced any evidence negating the scienter element. They have not demonstrated that Huttinger did not act willfuly, that is "with a fraudulent

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[96] *Id.* at 1241, *citing*, *Morissette v. United States*, 342 U.S. 246, 272, 72 S.Ct. 240, 254, 96 L.Ed. 288 (1952).

[97] *Id.*, *citing*, *United States v. Dupee*, 569 F.2d 1061, 1064 (9th Cir.1978).

[98] *Id.*

[99] *Id.* Scienter is an essential element of a § 664 violation.

[100] Brief of ALPA and Huttinger at 36-37, *citing*, *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir.1980).

intent or a bad purpose or an evil motive." [101] Since the movants have not shown the absence of any disputed fact issues in this regard, they have failed to meet their burden. Thus the allegations in the pilots' Complaints stand and remain for resolution on remand.

The fact that pilots have made allegations which the RICO defendants refute in brief but not with facts, by way of affidavit evidence or otherwise, shows that factual issues remain to be resolved. The only way movants could prevail on this aspect of their summary judgment motion is by a legal finding that Huttinger did not breach any fiduciary duties under ERISA or 29 U.S.C. § 501.[102] As we found above that Huttinger clearly did breach fiduciary duties,[103] the factual issues remain to be resolved.

C. Pattern

The United States Supreme Court has recently revised and "clarified" the definition of pattern in the RICO statute. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. ——, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), the Supreme Court rejected the Eighth Circuit's "multiple scheme" requirement and also disagreed with "those courts that have suggested that a pattern is established

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[101] *Id.*

[102] Pilots allege that Huttinger breached the fiduciary duties imposed by ERISA and those created by 29 U.S.C. § 501. The ERISA claims are dealt with, *supra*. 29 U.S.C. § 501. Fiduciary responsibility of officers of labor organizations:

> (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person . . . to hold its money and property solely for the benefit of the organization and its members. . . .

[103] *See supra*, ERISA portion of opinion.

merely by proving two predicate acts." [104] The Fifth Circuit has explicitly recognized that *H.J. Inc.* narrowed the definition of pattern from that previously used in this circuit.[105] Thus prior Fifth Circuit precedent, and those cases cited by the parties, are of little assistance to us.

In *H.J. Inc.*, the Supreme Court found that.

> RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.[106]

The relationship element has been defined by borrowing from a related statute. "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events." [107] The Supreme Court found the definition of continuity more difficult, and opted for a flexible approach that they believe derives from a common everyday understanding of RICO.

> What a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*. . . . "Continuity" is both a closed- and open-

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[104] *H.J., Inc.*, 492 U.S. at ——, 109 S.Ct. at 2899, 106 L.Ed.2d at 206.

[105] *Smith v. Cooper/T. Smith Corp.*, 886 F.2d 755, 756 (5th Cir. 1989). The prior Fifth Circuit pattern requirement was described in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir.1985) (holding that two "related" acts of mail fraud constitute a pattern).

[106] *H.J. Inc.*, 492 U.S. at ——, 109 S.Ct. at 2900, 106 L.Ed.2d at 208.

[107] *Id.* The definition of relationship thus adopted is the pattern definition from Title X of the Organized Crime Control Act (OCCA), which is the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575, *et seq.* RICO forms Title IX of the OCCA.

> ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. . . . It is, in either case, centrally a temporal concept—and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear to one another, are distinct requirements.[108]

The relationship element is easily satisfied here by pilots' allegations. First, all of the predicate acts were aimed at achieving a single goal—relocation of the pilots' base to El Salvador. Only through the accomplishment of this goal could all of the RICO defendants' subsidiary goals be accomplished. Second, we find the participants were the same: ALPA and Huttinger. Third, the victims were the same: the pilots. Finally, the events are in no way isolated, but are related in the sense that they all occurred or commenced during or grew out of the process of negotiating TACA's relocation program. The RICO defendants have put on some evidence that might negate the first element. For example, they have showed that ALPA's actions were not motivated by a desire to rid itself of a small, costly union. They have not, however, rebutted the allegation that ALPA gave in to TACA to avoid prosecution for its sabotage activities. Likewise, they have tried to show that Huttinger's re-

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[108] *Id.*, 492 U.S. at ——, 109 S.Ct. at 2901, 106 L.Ed.2d at 209. The Court went on to clarify how "continuity" may be proved.

> A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Prediate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

ceipt of pension benefits was proper from the standpoint of FBA. They have not, however, removed factual disputes regarding the propriety of Huttinger's activities or his goals.

In sum, pilots have alleged relationship. The RICO defendants' affidavits and submissions do not "show that there is no genuine issues as to any material fact" in this regard. F.R.Civ.P. 56(c). Thus, on remand, the trial court must determine whether the relationship element of the pattern requirement is met.

We find that the continuity element of the pattern requirement is disposed of by our prior discussion of the RICO person requirement. There we found the existence of factual issues regarding the threat of continued racketeering activity by these defendants/appellees. At least some of the racketeering acts that threaten to continue are related under the test applied above and for the same reasons.

D. Enterprise

Pilots have developed two alternative theories of the enterprise. The above discussion has made reference to these separate claims where necessary, and they will be dealt with in detail here.

1. "Association-in-Fact" Enterprise

An association-in-fact enterprise must also meet a continuity requirement. Such an enterprise "(1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit shown by a hierarchical or consensual decision making structure." [109] We find that the association-in-fact enter-

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[109] *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir.1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989), *citing*, *Manax v. McNamara*, 842 F.2d 808, 811 (5th Cir.1988); *Foval v. First Nat'l Bank of Commerce*, 841 F.2d

prise, if it ever existed, was one that "briefly flournished and faded" and therefore fails to meet the requirement that it function as a continuing unit. We do not believe this to be inconsistent with our findings of fact issues regarding continuiy in the RICO person and the pattern requirements. There the threat was sufficient if it came from an indiviual. Here pilots were required to show that the enterprise as a whole functioned as a continuing unit. In a case like this, where the enterprise's goals have been accomplished, and where those goals were achieved in a matter of months, through a discrete pattern of activity, there is no continuity.

In addition, pilots have not alleged or shown the existence of an enterprise separate and apart from the pattern of racketeering activity.[110] It appears that once the "Pilots' Agreement" was reached, and the follow-up acts—such as obtaining the pilots' severances and terminating ALPA representation—had occurred, the enterprise ceased to exist. In reality, the association of ALPA and Huttinger had no alleged purpose other than to commit the predicate acts leading up to the relocation.

2. ALPA as Enterprise

The pilots' second enterprise theory sees ALPA as the legal enterprise which was a vehicle for racketeering activities by TACA and Huttinger.[111] There is no question that ALPA itself satisfies § 1961(4)'s definition of enterprise: " 'enterprise' includes any individual, partnership,

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126, 129-30 (5th Cir.1988); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426-27 (5th Cir.1987); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir.1987), *cert. denied*, 483 U.S. 1032, 107 S.Ct. 3276, 97 L.Ed.2d 780 (1987); *Shaffer v. Williams*, 794 F.2d 1030, 1032 (5th Cir.1986).

[110] *See Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748-49 (5th Cir.1989), *citing, Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir.1987).

[111] ALPA's position as a defendant under this theory is discussed, *supra* at Part IV.A.1.

corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." ALPA was continuously in existence throughout the period when the alleged predicate acts occurred. It remains in existence today. Thus this district court erred in not finding an enterprise under this theory.

E. RICO Conclusion

We have found that TACA is not an appropriate RICO defendant because pilots did not allege that it constitutes a continuing threat. ALPA is a RICO defendant only for purposes of the § 1962(b) violation; it cannot be both the enterprise and a defendant for purposes of the § 1962(c) claim. Huttinger is properly a RICO defendant as to all of pilots' claims.

With regard to the alleged *predicate acts* of racketeering activity, we have affirmed the trial court in some regards and reversed in others. We agree with the trial court that the extortion claim was not properly alleged nor supported by the record. The 29 U.S.C. § 186 claim cannot stand because RLA employers and employees, as a matter of law, are not subject to this provision of the LMRA. We reverse the trial court's decision with respect to the mail and wire fraud claims. There are genuine issues of material fact. Finally, we find that the summary judgment movants have not met their burden of showing the absence of factual disputes regarding Huttinger's alleged embezzlement or conversion. Thus pilots' allegations remain to be resolved on remand.

The Supreme Court's recent decision in *H.J., Inc.* holds that in order to prove a *pattern* of racketeering activity, the RICO plaintiff must show both relationship and continuity. We affirm the trial court's holding that a pattern was properly alleged under this new test. The increased complexity of the new test requires that we remand this issue for resolution of material factual disputes.

Finally, we affirm in part and reverse in part the trial court's holding that there was no *enterprise* alleged. We agree that there was no "association-in-fact" enterprise alleged because pilots could not show the requisite continuity. However, we hold that the pilots properly alleged that ALPA is a RICO enterprise.

V. Discovery Issues

The pilots filed an amended complaint setting forth a RICO claim on April 6, 1987 and a RICO Case Statement, required by the district court's standing order, on August 25, 1987. At no time in this interval did the pilots seek discovery. ALPA, TACA and Huttinger moved for summary judgment on the RICO claims and those motions were set for hearing on October 21, 1987. After the motions were set for argument, the pilots requested and received a "courtesy" continuance [112] postponing the hearing until December 2, 1987. Once they had the continuance, pilots noticed the depositions of Huttinger, FBA and Captain Donald Scott for the last week in October.

TACA, ALPA and Huttinger moved for protective orders pursuant to F.R.Civ.P. 26(c) and (d) to prevent the taking of these depositions prior to the resolution of the summary judgment motions. The hearing on the summary judgment motions was again continued so that the requests for protective orders could be heard. At ALPA's request the depositions were rescheduled to mid-December. The trial court granted the protective order staying discovery pending its decision on the summary judgment motions. Eventually, the summary judgment motions were granted on March 17, 1988, with no discovery having been taken.

In its order, the trial court stayed discovery pursuant to F.R.Civ.P. 26(c) "for good cause." It found that

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[112] We adopt this term to refer to an unopposed continuance motion signed by the trial court.

many of the issues raised by the summary judgment motions were purely legal and that discovery would therefore not aid their resolution. As to the factual issues presented by the motion, the trial court ruled that "the plaintiffs have failed to identify with the requisite specificity of F.R.Civ.P. 56(f) the issues which must be amplified by discovery."

F.R.Civ.P. 56(f) provides that:

> Should it appear from the affidavits of a party opposing the [summary judgment]motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

However, what existed below was not a Rule 56(f) motion. In the typical 56(f) case, a nonmovant submits affidavits and requests additional time to conduct discovery to enable him to respond to a summary judgment motion. In the case at bar, a continuance was granted. In the time thus created before the hearing on the motions, the pilots sought discovery to enable them better to respond. In the ordinary course of events this discovery would have been freely allowed, even unquestioned. However, in this case, the summary judgment movants, ALPA, TACA and Huttinger, moved the court for a Rule 26(c) protective order to prevent the taking of the depositions. Thus the burden was on ALPA, TACA and Huttinger to show why a protective order was warranted. The burden was not on the pilots, other than in rebuttal, to show why the discovery was needed.[113] Although the trial

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[113] Had pilots sought a continuance for purposes of obtaining summary judgment evidence, the burden would have been on them to demonstrate " 'how postponement of a ruling on the motion [would] enable [them], by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.' " *S.E.C. v. Spence & Greene*, 612 F.2d 896, 901 (5th Cir.1980), *citing*, *Will-*

court applied the wrong standard and placed the burden on the wrong party, we find that it reached the correct result.

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown," a district court is authorized to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." F.R.Civ.P. 26(c). In their motions for protective orders, the defendants gave several reasons why this discovery was not needed prior to the resolution of the summary judgment motions which, if granted, would preclude the need for the discovery altogether. They correctly stated that no discovery was needed to resolve the motions to dismiss under F.R.Civ.P. 12(b)(6). Such motions are decided on the face of the complaint. Defendants also argued that the summary judgment motions could be decided as a matter of law on the basis of the undisputed facts already before the court. They alleged that the timing of the depositions—coming as they did after the grant of a courtesy continuance to respond to the motions—was evidence of bad faith. Finally, they argued that since the discovery was not needed to resolve the summary judgment motions—and thus perhaps not needed at all—the depositions would be unduly expensive and burdensome.

We find that by these arguments ALPA, TACA and Huttiger met their burden of showing, *prima facie*, why

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mar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 297 (8th Cir.1975), *cert. denied*, 424 U.S. 915, 96 S.Ct. 1116, 47 L.Ed.d 320 (1976). However, as we have stated, *supra*, no Rule 56(f) motion was filed. Pilots had already received the continuance order when they noticed the depositions. Pilots had a rebuttal burden, but no burden to make a prima facie showing of need.

We acknowledge that pilots filed a Rule 56(f) affidavit in response to the motions for protective orders. This was an inappropriate response on their part. Pilots did not have the burden to make a Rule 56(f) showing to counter the Rule 26(c) motions.

a protective order was warranted—that is, why the discovery sought would be unduly burdensome and expensive. Thus the burden reverted to the pilots, on rebuttal, to show a need for the depositions such that their burden and expense would not be "undue." Pilots did respond. They argued that the case was still in a "preliminary stage" given the complexity of the legal issues involved and that they had "always contemplated discovery" but that the "early motions of the defendants simply required none." Also they pointed to the fact that no pretrial discovery deadline had been set.

The protective order suspended activity until a decision could be made on the summary judgment motion. The trial court sought to resolve an issue that might preclude the need for the discovery altogether thus saving time and expense.[114] In response to the movants' showing, the pilots failed to show the protective order was unwarranted. They asserted no facts they hoped to adduce, no genuine issues of material fact they hoped to create, no showing they hoped to rebut. In fact pilots said they had sufficient evidence to defeat the summary judgment motions and sought discovery only to obtain "better" evidence.

We find that pilots' showing was insufficient. "'[A] plaintiff's entitlement to discovery prior to a ruling on a motion for summary judgment is not unlimited and may be cut off when the record shows that the requested discovery is not likely to produce the facts needed by [the party] to withstand a Rule 56(e) motion for summary judgment.'" [115]

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[114] Trial courts possess broad discretion to supervise discovery. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 550 (5th Cir.1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981).

[115] *Williamson v. United States Dept. of Agriculture*, 815 F.2d 368, 382 (5th Cir.1987), *citing*, *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1029-30 (5th Cir.1983).

Discovery is not justified when cost and inconvenience will be its sole result.[116] On the record before it, the trial court had to reach the decision that it did reach. The procedural posture of the case and the showings of the parties left it little choice. Whether the trial judge surmised that pilots would not be able to defeat the summary judgment motions or whether he, like us, saw sufficient disputed facts to preclude summary judgment is irrelevant. Under the circumstances, there was no abuse of discretion in the order staying discovery until the summary judgment motions were resolved.[117]

Of course our finding that the stay of discovery was not an abuse of discretion has no effect as to those matters remanded. The parties are entitled to the full scope of discovery generally available during preparation for trial.

VI. Conclusion

Our opinion affirms in part, reverses in part, and remands in part.

We affirm the trial court's holding that pilots' labor law claims were barred by the statute of limitations.

As for ERISA, we reverse the trial court's holding that the Plan was not in effect until April 15, 1985. On remand, we instruct the court to accept as a matter of law that the Plan was in effect on February 1, 1982.

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[116] *See Washington v. Norton Manufacturing, Inc.*, 588 F.2d 441, 447 (5th Cir.1979), *cert. denied*, 442 U.S. 942, 99 S.Ct. 2886, 61 L.Ed.2d 313 (1979) (discovery properly denied where it "could not have added any significant facts and would only have been expensive and burdensome . . ."); *Wyatt v. Kaplan*, 686 F.2d 276, 284 n. 15 (5th Cir.1982) (clarifying *Washington*).

[117] *See Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976) (no abuse of discretion in limiting discovery to issues raised by the summary judgment motions, although "the situation would be quite different if plaintiff had been denied discovery which related to the summary judgment motion").

We reverse the court's holding that there were no genuine issues of material fact as to whether ALPA, TACA, or Huttinger had any fiduciary duties under the Plan. On remand, we instruct the court to determine whether ALPA, TACA, or Huttinger had any fiduciary duties with respect to the ERISA-based wrongs alleged in the complaint. We also find as a matter of law that Huttinger had a fiduciary duty to disclose information about the Plan when asked.

On the RICO issues, we affirm the trial court's holdings that: (i) TACA is not a RICO defendant;[118] (ii) pilots have not properly alleged extortion or a violation of 29 U.S.C. § 186 as predicate acts; (iii) a pattern of racketeering activity was alleged; and (iv) no association-in-fact enterprise existed.

We reverse the trial court and hold that ALPA was a RICO enterprise. Finally, we find that genuine issues of material fact exist with regard to the following allegations made by the pilots: (i) ALPA and Huttinger are RICO persons and thus appropriate RICO defendants; (ii) predicate acts of mail and wire fraud and an 18 U.S.C. § 664 violation occurred; (iii) a pattern of racketeering activity exists; and (iv) ALPA constitutes an enterprise for RICO purposes. Because we find that a genuine issue of material fact exists as to each of the elements essential to stating a valid RICO claim, we remand these issues to the trial court for proceedings not inconsistent with this opinion.

Lastly, we affirm the trial court's decision to grant a protective order staying discovery pending its summary judgment decision. Our affirmance of this order has no effect as to those matters remanded. We expect that discovery will proceed on a normal course at that time.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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[118] We also find that ALPA is not a RICO defendant for purposes of the § 1962(c) claim.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3363

D.C. Docket No. CA-86-3196-K-(3)

FRANK LANDRY, *et al.*,
Plaintiffs-Appellants,

versus

AIR LINE PILOTS ASSOCIATION INTERNATIONAL
AFL-CIO, TACA AIRLINES, S.A. and
CHARLES J. HUTTINGER,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before BROWN, JOHNSON and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

January 31, 1990

ISSUED AS MANDATE:

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3196

SECTION: "K" (3)

FRANK LANDRY, *et al.*

versus

AIRLINE PILOTS' ASSOCIATION,
INTERNATIONAL, AFL-CIO, *et al.*

OPINION

[Filed Mar. 17, 1988]

INTRODUCTION:

This matter arises from the relocation in 1985 by TACA International Air Lines, S.A. (TACA) of its pilots' base from New Orleans, Louisiana to San Salvador, El Salvador. The plaintiffs in this case are 15 former TACA pilots who left the air line when the pilots' base was moved. On July 23, 1986, the plaintiffs sued TACA and the Air Line Pilots' Association, International, AFL-CIO (ALPA), the union which represented TACA pilots in collective bargaining with their employer and Fringe Benefits Administrators ("FBA"), the administrator of a short-lived pension plan established for retired TACA pilots. The plaintiffs asserted two separate claims for relief against TACA and ALPA, (1) a "hybrid" claim that TACA breached its collective bargaining agreement and ALPA breached its duty of fair

representation and (2) a claim under the Employment Retirement Income Security Act ("ERISA"). TACA and ALPA filed motions, accompanied by affidavits and other evidence, to dismiss the plaintiffs' claims or, in the alternative, for summary judgment. The plaintiffs opposed the defendants' motions by filing two memoranda and numerous affidavits. The plaintiffs did not request permission to conduct discovery before the Court ruled on the motions. On April 24, 1987, the Court granted the motions of both defendants, finding that the "hybrid" claims were barred by the running of the applicable statute of limitations and that the plaintiffs had failed to identify a theory by which TACA and ALPA could be held liable under ERISA.

Shortly before the Court's ruling, on April 6, 1987, the plaintiffs amended their complaint by adding one additional count, stating claims against TACA and ALPA under the Racketeering Influenced and Corrupt Organizations Act ("RICO") and to name Charles Huttinger as an additional defendant. TACA and ALPA immediately moved to dismiss the RICO claims. However, at the request of the plaintiffs, the Court denied the motions without prejudice; to afford the plaintiffs a second opportunity to properly state their claims with particularity, the Court ordered the plaintiffs to file a RICO case statement.[1]

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[1] The United States District Court for the Eastern District of Louisiana requires that in cases in which a party makes a claim under the RICO statute, the court shall issue a RICO standing order to the RICO claimant. The RICO standing order is a tool born out of the great expansion in the use of civil RICO in otherwise routine litigation. The order requires a RICO claimant to "flesh out" his RICO theories by filing into the record a "RICO case statement", and serves essentially the same function as an order for a more definite statement under Fed.R.Civ.P. 12(e). Filing the RICO case statement, however, is not a substitute for amending one's pleadings to state new or different claims, as the standing order does not require the case statement to meet the requirements for the form of pleadings or service of process.

When the plaintiffs filed their RICO case statement, TACA and ALPA renewed their motions to dismiss or for summary judgment. After the defendants' motions had been reset for oral argument, well over a year after the plaintiffs filed suit, the plaintiffs attempted, for the first time, to take depositions of certain persons. TACA and ALPA agreed to a continuance of the hearing and filed motions to quash the depositions and to stay discovery pending a ruling on the defendants' motions. The Court granted the motions to quash and stayed discovery, findings that many of the issues raised in the motions were purely questions of law which would be unaffected by discovery, that the plaintiffs had inexcusably delayed instituting discovery and that the plaintiffs had failed to identify specific isues as to which discovery was needed, as required by Fed.R.Civ.P. 56(f).

Now, for the reasons stated below, the Court finds that the defendants' motions have merit and that the plaintiffs' RICO claims should be dismissed.

HISTORY OF TACA'S ATTEMPTS TO RELOCATE TO EL SALVADOR:

TACA is an airline incorporated under the laws of El Salvador which services locations in Central America and the United States. From 1949 until 1985, all TACA pilots were based in New Orleans, Louisiana. In 1969, the government of El Salvador directed TACA to relocate its pilot base to El Salvador. TACA attempted to move its base but was blocked by a successful injunction suit brought by ALPA. The Court of Appeals upheld the injunction, holding that the pilot base dispute was a "major" dispute under the Railway Labor Act ("RLA"), rather than a "minor" dispute resolvable by the RLA's adjustment mechanism. *See Ruby v. TACA International Air Lines, S.A.*, 439 F.2d 1359 (5th Cir. 1971). (See discussion, infra).

TACA and ALPA resolved this dispute by allowing the pilot base to remain in New Orleans.

Over the years, TACA and ALPA have continued to enter into collective bargaining agreements pursuant to the RLA. The air line and the union entered into an important collective bargaining agreement in October of 1979, which was effective January 1, 1980 and amendable December 31, 1983.

In 1983, the nation of El Salvador adopted a new constitution which requires each Salvadoran public service company to have its work center and base of operations located within El Salvador. In October, 1983, ALPA and TACA were in the midst of negotiations for the amendment and continuation of the 1980 collective bargaining agreement. However, the Salvadoran government directed TACA to move its pilot based to El Salvador. In December 1983, TACA immediately and unilaterally notified its pilots that the pilot base would be moved and that ALPA would no longer be recognized as the pilots' bargaining agent.

ALPA sought and obtained a permanent injunction prohibiting TACA from relocating the pilot base, unilaterally changing the terms of employment, recruiting replacement pilots, and interfering with the pilots' choice of ALPA as their bargaining agent. The Court of Appeals for the Fifth Circuit affirmed the injunction but noted that:

> We neither hold nor suggest that TACA may not relocate its pilot base. We hold only that TACA must relocate its pilot base and effect the other intended steps in accordance with the substantive laws and procedures set forth in the Railway Labor Act and other relevant domestic laws.

Air Line Pilots' Assn. v. TACA Intern. Air Lines, 748 F.2d 965, 972 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

Between 1984 and 1985, TACA and ALPA continued negotiations under the auspices of the National Media-

tion Board. On July 24, 1985, TACA and ALPA reached an agreement entitled "Pilots' Agreement", which superseded the 1980 collective bargaining agreement, provided that ALPA would not oppose TACA's relocation of its pilot base[] to El Salvador after August 31, 1985, and specified that all TACA pilots on the TACA seniority [list] as of June 30, 1985, could elect either to leave the company and accept severance pay and other benefits or continue their employment as TACA pilots based in El Salvador. Each of the named plaintiffs, except Gary Zyriek, who had left TACA's service, elected to take severance pay and leave the company. The defendant, Charles Huttinger, likewise accepted severance pay.

On December 17, 1985, TACA and ALPA entered into a final "Settlement Agreement" which resolved all claims arising out of the July 24, 1985 "Pilots' Agreement." As claimed by the plaintiffs, ALPA was represented throughout most of the above-described negotiations and agreements by Charles Huttinger, a TACA pilot who served as a member of the ALPA board of directors and chairman of the ALPA Master Executive Council.

THE PLAINTIFFS' RICO CLAIMS:

The plaintiffs' allegations of facts and theories of law are scattered throughout the record and do not appear together in a single document. The Court has attempted to glean from the record any theories or allegations which are relevant to a civil RICO claim. Many of the plaintiffs' allegations, while possibly pertinent to their time-barred "hybrid" labor law claims, have no bearing on their RICO claims. Nevertheless, some mention of those extraneous arguments is necessary in order to understand the plaintiffs' RICO claims.

The RICO statute, 18 U.S.C. §§ 1961-1968, provides a private civil action to recover damages for injuries which are the result of a violation of its substantive provisions. In order to state a claim under RICO, the plaintiff must allege that (1) the defendant, through the commission

of two or more acts, (2) constituting a "pattern" (3) of "racketeering activity" (4) directly or indirectly invests in or maintains an interest in, or participates in, (5) an "enterprise" (6) the activities of which affect interstate commerce. *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).[2]

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[2] 18 U.S.C., § 1962 provides that:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of § 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer, held by the purchaser, the members of his immediate family, and his or her accomplices in any pattern of racketeering activity or the collection of any unlawful debt after such purchase, do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Section 1961(1)(a) defines "racketeering activity" to include an act or threat punishable as a felony under state law involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, etc. Subsection (b) further defines the term to include acts which are indictable under the federal criminal statutes relating to bribery, embezzlement from pension and welfare funds, mail fraud, wire fraud, and other specifically enumerated offenses. Subsection (c) specifically defines "racketeering activity" to include any act which is indictable under 29 U.S.C. § 186 (dealing with restrictions on payments and loans to labor organizations) or 13 U.S.C. § 501(c) (relating to embezzlement from union funds). 18 U.S.C. § 1961(5) defines a "pattern of racketeering activity" to require at least two acts of "racketeering activity" occurring within ten years of each other.

The plaintiffs have alleged that the defendants, ALPA, TACA and Huttinger acted together fraudulently to defraud the pilots of wages and benefits owed to them under the collective bargaining agreement. Each defendant allegedly received an individual benefit by agreeing, against the best interests of the TACA pilots, to arrange for relocating the TACA pilots' base to El Salvador.

The defendants' pattern of racketeering activity allegedly commenced in the spring of 1985, when a TACA pilot named Glen Padgett, "at the direction of Huttinger and ALPA," committed numerous acts of sabotage against TACA aircraft and equipment for the purpose of coercing TACA into concessions during negotiation of the collective bargaining agreement. (RICO case statement, pp. 4-5) (Affidavit of Gary Zyriek, plaintiff's exhibit "H".) The actions of Huttinger, Padgett and ALPA allegedly constituted the predicate acts of extortion in violation of Louisiana state law and 18 U.S.C. § 1951.

The plaintiffs further claim that because Huttinger suffered from a disability, his active status as a TACA

pilot should have been terminated in late 1984. Consequently, Huttinger was no longer entitled to receive sick leave benefits, to remain on TACA's seniority list, or to represent ALPA in negotiations with TACA. Nevertheless, it is claimed that Huttinger somehow pressured TACA into retaining Huttinger on its seniority list and paying him sick leave benefits. Then TACA and ALPA reached an agreement as to the relocation of the pilot base, Huttinger accepted a lump sum severance payment of over $26,000, to which, the plaintiffs claim, he was not entitled because of his ineligibility. Huttinger's receipt of these benefits allegedly constituted illegal payments to a labor official in violation of 29 U.S.C. § 186.

Sometime in 1985, TACA allegedly threatened ALPA with criminal and civil prosecution for Padgett's acts of sabotage. TACA allegedly used these threats to pressure Huttinger and ALPA into "selling out" the plaintiffs by acquiescing in the relocation of the pilot base.

The plaintiffs have identified three specific acts which allegedly constitute mail fraud. On July 3, 1985, Huttinger allegedly wrote to the pilots to inform them that negotiations between ALPA and TACA had broken down. Huttinger accused TACA of having "despicable intentions" and falsely stated that, "Regardless of the outcome of these negotiations, TACA must continue to contribute to the plan . . . the Pension Plan should not be the subject of these negotiations." (RICO case statement, p. 8). On July 24, 1985, Huttinger allegedly sent a telegram and a letter to the pilots which informed then that TACA and ALPA had reached an agreement which was subject to ratification. The communications did not disclose the nature of the agreement. On August 3, 1985, TACA sent a letter to the pilots. The letter informed the pilots that the union had agreed to relocation of the base. The letter also directed the pilots to decide within 12 days whether to leave TACA and take severance pay or stay with TACA and move to El Salvador.

TACA allegedly did not inform the pilots that their retirement fund had been terminated and falsely stated that TACA would offer continued employment for North American pilots. In addition, the plaintiffs claim that the defendants used the mails to make illegal payments to Huttinger in furtherance of their scheme to defraud the plaintiffs.[3]

Finally, the plaintiffs claim that because Huttinger has received and continues to receive retirement benefits from the pension plan, he has violated 18 U.S.C. § 664.[4]

The Court cannot properly consider the alleged acts of racketeering activity. If, indeed, such acts were committed, they must have been perpetrated before the al-

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[3] Because the plaintiffs' allegation of mail fraud in connection with the mailing of payments to Huttinger fails the requirement of Fed.R.Civ.P. 9(b) that fraud be pleaded with specificity, those allegations are not considered by the Court.

[4] In addition to the plaintiffs' RICO claims, the plaintiffs have stated in their RICO case statement that, "The actions of Huttinger constitute violations of his fiduciary responsibility in regard to the pension and union funds pursuant to 29 U.S.C. § 501." (RICO case statement, p. 26) This purported "claim for relief" does not appear in either the original or the amended complaint and thus is not properly before the Court. Although the defendants have called this matter to the plaintiffs' attention, the plaintiffs have not sought to amend their complaint. Moreover, although the parties have briefed the merits of this "claim", the plaintiffs have failed to come forward with evidence to establish a genuine issue of material fact. The plaintiffs have filed the affidavit of Bert Haffner, one of the plaintiffs, in which he states that Richard Watson, the president of FBA, told him that ALPA had directed him to pay retirement benefits to Charles Huttinger. Fed.R.Civ.P. 56(e) provides that "Supporting and opposing affidavits shall be made *on personal knowledge*, shall set forth such facts as would be *admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (Emphasis added.) Mr. Haffner's allegations as to ALPA's control of the pension fund are clearly not based on personal knowledge and must be disregarded. The plaintiffs' "claim" under 29 U.S.C. § 501 is dimissed.

leged RICO enterprise came into being. According to the plaintiffs, ALPA's motives in agreeing to the relocation of the TACA pilot base were to decertify a small and costly local union and to avoid civil and criminal litigation. These goals are completely inconsistent with the plaintiffs' claims that ALPA endorsed sabotage for the purpose of gaining concessions for the benefit of the union. The alleged acts of sabotage might have placed ALPA in a position to be pressured by TACA into agreeing to the relocation. But the defendants' alleged extortionate acts could not have, and have not, been properly alleged to have been committed in the establishment or conduct of the affairs of an enterprise. Finally, the alleged acts of sabotage are not actionable because the plaintiffs did not sustain direct injury as a result of those acts. *See Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, 670 F.Supp. 597, 599 (W.D. Pa. 1987) (standing to maintain a private civil RICO action depends on whether the plaintiffs suffered 'direct injury' by the conduct which violates § 1962.")

The plaintiffs' claim under 29 U.S.C. § 186 (§ 302 of the Labor Management Relations Act) fails as a matter of law. The statute makes it unlawful for an employer to pay or lend money or another thing of value to the union which represents its employees or to the union's officers, and for a union to receive or demand such prohibited payments, subject to certain exceptions. The Labor Management Relations Act specifically excludes a Railway Labor Act "employer" or "employee" from the coverage of the Act. 29 U.S.C. § 142(3); 29 U.S.C. § 152(2),(3). *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (395) (1969); *United States v. Davidoff*, 359 F.Supp. 545, 547-48 (E.D. N.Y. 1973); *Schott v. Hotel-Motel Ser. Workers, Etc., Local 593*, 587 F.Supp. 1095, 1097 (N.D. Ill. 1983). The Court rejects the plaintiffs' argument that the pilots' agreement removed TACA from RLA coverage and subjected the defendants to the requirements of the Labor

Management Relations Act. The pilots' agreement did not purport to relieve TACA of its RLA obligations until September 1, 1985, long after the alleged inducements for entry into the agreement. In addition, the plaintiffs have provided no support for the proposition that one may, by contract, bring himself within the proscription of a criminal statute when Congress has elected to exclude that person from the coverage of the law.

PATTERN OF RACKETEERING ACTIVITY:

The defendants contend that the plaintiffs have not sufficiently alleged a "pattern of racketeering activity" because the defendants' alleged misdeeds were all perpetrated in furtherance of a single scheme—to effect the relocation of the pilot base.

The United States Supreme Court in footnote 14 of *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 3285 n. 14 (1985) stated that a pattern of racketeering activity requires "at least two acts of racketeering activity." The Court stated that this implies that "while two acts are necessary, they may not be sufficient." The legislative history of RICO "requires more than one single 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." *Id.*

The various courts of appeals have advanced varying views as to the degree of continuity necessary to constitute a pattern of racketeering activity. The broadest test, endorsed by the Second Circuit in *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 3229 & 3230 (1987), requires only two predicate acts of racketeering activity in furtherance of a single scheme. Other courts have held that a single transaction, while consisting of numerous individual acts of mail and wire fraud, is insufficient to

demonstrate a pattern of racketeering activity. *See Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986).

The Seventh Circuit in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), rejected a mechanical test for finding a pattern of racketeering activity. "In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be on-going over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., transactions somewhat separated in time and place." *Id.* The Court looked to a number of factors, including the number and variety of predicate acts alleged, the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. *Id.*

The position of the Fifth Circuit on the "pattern" requirement is clear, although its future is questionable. In *R.A.G.S. Coutoure, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), the Fifth Circuit adopted the most liberal approach, finding that two related instances of mail fraud satisfy the "pattern" requirement. However, in *Montensano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987), another panel of the Fifth Circuit urged that the *R.A.G.S.* decision be overturned *en banc*. The court recognized that the precedent set in *R.A.G.S.* must be considered binding until overruled *en banc*. However, the court strongly urged that a stricter test be imposed under the pattern requirement. Focusing on the legislative history of RICO, the court stated that a series of acts which are simply "preparatory to a discrete accomplishment" cannot be considered a "pattern of racketeering activity." *Id.* The court concluded by quoting the language of the Tenth Circuit:

> A scheme to achieve a single discrete objective does not of itself create a threat of on-going activity, even when that goal is pursued by multiple illegal

> acts, because the scheme ends when the purpose is accomplished.

In the present case, because this Court remains restrained by *R.A.G.S.*, the plaintiffs have properly alleged the existence of a pattern of racketeering activity. Absent that restraint, the Court would unhesitatingly deny plaintiffs' RICO claims on that basis alone. However, simply because the plaintiffs may have, under existing precedent, established one element of the RIÇO claims, does not save them from dismissal on other bases.

FAILURE TO PROPERLY ALLEGE "ENTERPRISE":

The plaintiffs in their RICO case statement allege two alternative theories of "enterprise". Under the first scenario, TACA, ALPA and Huttinger constitute an "association in fact" enterprise; under the second, ALPA itself is the enterprise for which TACA and Huttinger allegedly conducted a pattern of racketeering activity. According to the plaintiffs, "The enterprise was formed in order to further the goals of its individual members." (RICO case statement, p. 12.) The plaintiffs described the individual goals of the defendants as follows:

> The plan of the enterprise was to allow TACA to relocate its base to El Salvador, avoid a strike, and save itself millions of dollars in the process. The enterprise accommodated ALPA by eliminating ALPA's representation of a small union that made little contribution, but large financial demands on ALPA's resources. ALPA also acted to avoid criminal prosecution and a civil lawsuit. The enterprise furthered Huttinger's interest by avoiding criminal prosecution, giving him additional sick leave, severance pay and retirement benefits he would not have otherwise received.

(RICO case statement, pp. 12-13.)

The defendants assert that the plaintiffs have failed to adequately state the existence of an enterprise because neither of the alternative enterprises alleged by the plaintiffs possesses the requisite continuity.

A RICO enterprise must have an ongoing organization, with associates functioning as a continuing unit. *United States v. Turkette*, 452 U.S. 576, 583 (1981); *Shaffer v. Williams*, 794 F.2d 1030, 1032 (5th Cir. 1986); *United States v. Phillips*, 664 F.2d 971, 1012 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982). An ongoing organization is shown by the existence of a decision making structure, whether hierarchical or consensual. *Shaffer*, 794 F.2d at 1033; *United States v. Riccobene*, 709 F.2d 214, 222 (3rd Cir.), *cert. denied*, 464 U.S. 849 (1983). The RICO enterprise must have a common or shared purpose and continuity of structure and personnel. *Shaffer*, 794 F.2d at 1032; *United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983). The Fifth Circuit requires that plaintiffs plead "specific facts" which establish the existence of an enterprise. *Montensano*, 818 F.2d at 427.

In *Montensano*, 818 F.2d at 426, the Court of Appeals for the Fifth Circuit held that, although the plaintiff had properly alleged a "pattern of racketeering activity", the district court correctly dismissed the plaintiff's claims on the ground that the "enterprise" alleged by the plaintiff lacked the continuity required to establish liability under RICO. The defendant in *Montesano* had made a loan of money to three individuals; the loan was secured by ship mortgages on vessels owned by a partnership. The debtors became delinquent in their payments, and the lender, rather than instituting judicial foreclosure proceedings, obtained possession of the vessels directly from a repairer who had possession of the vessel. The vessel owner sued the lender under RICO, alleging predicate acts of wire fraud in the form of telephone conversation initiated

by the lender and the repossessing agent. The plaintiff alleged that the lender, the repossessing agent and an individual joined together as an enterprise for the purpose of illegally repossessing the vessel.

The Fifth Circuit explained that, although *R.A.G.S.* does not require ongoing activity to establish a pattern of racketeering activity, the Supreme Court in *Turkette* recognized that an enterprise must function "as a continuing unit." The court stated that, "The plaintiffs did not allege that the defendants were functioning as a continuing unit, but only that they conspired in this one instance to repossess the vessel. The enterprise was the accomplishment of this discrete event. That is not enough." *Id.* at 427. Because the "enterprise" lacked continuity, the court affirmed the lower court's dismissal.

The Fifth Circuit's approach in *Montensano* is not unlike that of the Court of Appeals for the Second Circuit. In a line of decisions beginning with *United States v. Ianniello*, 808 F.2d 184 (2nd Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 3229 (1987), the Second Circuit has recognized that whether continuity is found in the pattern of racketeering activity or in the functioning of the enterprise, RICO requires behavior which can in some sense be considered to be continuous. In *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2nd Cir. 1987), the Second Circuit affirmed the dismissal of a RICO suit brought by bondholders against a trustee and several individuals for alleged wrongdoing in the sale of bond collateral and disposition of the proceeds of the sale of that collateral. The court concluded as follows:

> The enterprise alleged by the plaintiffs had but one straightforward, short-lived goal—the sale of the U.S. collateral at a reduced price. At the conclusion of the sale, the alleged enterprise ceased functioning. Such an association is not sufficiently continuing to

constitute an "enterprise" under 18 U.S.C. §§ 1961 (4), 1962(c).

Beck, 820 F.2d at 51. *See also Newman v. Rothschild*, 677 F.Supp. 146 (S.D.N.Y. 1987) (two-year stock commission churning scheme not "continuous" under RICO); *Mastercraft Industries, Inc. v. Breining*, 664 F.Supp. 859, 860 (S.D.N.Y. 1987) (enterprise lacked continuity because of "discrete, closed-ended scheme to defraud the plaintiff with relation to a specific promise of contractual performance and related acts of fraud and misrepresentation incident thereto."); *Pohlot v. Pohlot*, 664 F.Supp. 112, 118 (S.D.N.Y. 1987) (enterprise lacked continuity because "its common purpose had an obvious terminating goal or date".); *Terra Resources I. v. Burgin*, 664 F. Supp. 82, 85 (S.D.N.Y. 1987) ("essentially there must be an allegation that the enterprise exists solely to perpetrate fraud indefinitely").

In the present case, the plaintiffs have "alleged no continuing enterprise other than the defendants' lawful business", of which the particular fraud alleged is at best a minor part. *Breining*, 664 F.Supp. at 861. The single, overarching goal of the enterprises alternatively alleged by the plaintiffs was to effect the relocation, by fraudulent means, of the TACA pilot base. The scheme had "but one straightforward, short-lived goal . . . at the conclusion of which, the alleged enterprise ceased functioning." *Beck*, 820 F.2d at 51. Under one of the plaintiffs' alternative theories, ALPA, a labor union, is the enterprise. That ALPA continues to function as an organization, however, does not supply the missing element of continuity. It would be erroneous "to find that the continuing enterprise element of RICO is satisfied merely because the defendants' lawful business is continuing." *Breining*, 664 F.Supp. at 861.[5]

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[5] The Court also notes the significant possibility that the plaintiffs' mail and wire fraud claims may be preempted by federal labor law. *See Brown v. Keystone Consolidated Industries*, —— F.Supp. ——,

Accordingly,

IT IS ORDERED that the motions of the defendants to dismiss, or in the alternative, for summary judgment are granted.

New Orleans, Louisiana, this 16th day of March 1988.

/s/ George Arceneaux, Jr.
United States District Judge

Slip Op. No. 86 C 7298 (N.D.Ill. February 10, 1988); *Butchers Union, Local No. 498 v. SDC Investment, Inc.*, 631 F.Supp. 1001 (E.D.Cal. 1986). However, because it is unnecessary to resolve this issue, and because the Fifth Circuit has not ruled on the question, the Court *abstains from deciding the matter.*

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3196

SECTION "K" (3)

FRANK LANDRY, *et al.*

Versus

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*

MINUTE ENTRY

[Filed Feb. 29, 1988]

Currently before the Court is the motion of plaintiffs for reconsideration of the Court's order dated April 24, 1987, in which the Court dismissed the plaintiffs' claims under the Railway Labor Act against TACA International Airlines ("TACA") and Airline Pilots Association, International ("ALPA") because the plaintiffs' labor law claims were barred by the six month statute of limitations. The basis of plaintiffs' motion is that, "The Court apparently overlooked the doctrine of equitable tolling in its ruling." (Plaintiffs' memorandum in support of motion for reconsideration, p. 2.)

The plaintiffs' motion is entirely without merit. The motion for reconsideration, filed eight months after the Court's ruling, is untimely. In addition, the plaintiffs never raised the issue of equitable tolling in their memo-

randa opposing the defendants' motions to dismiss or, in the alternative, for summary judgment. *See FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (post-judgment motion for consideration "cannot be used to raise arguments which could, and should, have been made before the judgment [was] issued"); *Flores v. Procunier*, 745 F.2d 338, 339 (5th Cir. 1984) ("motion for consideration" is treated as a motion to alter or amend the judgment).

In order to prevail on a claim of equitable tolling, a plaintiff must show that the defendants actively concealed the conduct complained of and that the plaintiff failed, despite the exercise of due diligence on his part, to discover the facts which formed the basis of his claim. *United Klans of America v. McGovern*, 621 F.2d 152, 153 (5th Cir. 1980). In *Woollett v. Bankers Life Co.*, 572 F.Supp. 650, 658 (E.D. Mich. 1983), the Court explained that:

> [T]he concealment which tolls the statute must be an affirmative, independent act of concealment; mere silence or non-disclosure, even by corporate officials i[s] not enough. . . . Independent acts, "affirmative efforts to divert, mislead, or prevent discovery" there must be.

In the present case, the plaintiffs have not set forth any facts to establish, or even argued, that the defendants committed "affirmative, independent acts of concealment." On the contrary, plaintiff, Bert Haffner, admitted in his deposition that between July and August of 1985, he learned from Charles Huttinger, ALPA's negotiating representative, that ALPA had been coerced by TACA into agreeing to the relocation of the pilots' base. (Doc. No. 74, Exh. "A"). In addition, the plaintiff Gary Zyriek admitted in his affidavit that he learned from the Vice President of TACA that during the negotiations between TACA and ALPA, Charles Huttinger was not qualified to represent the pilots, and that Hut-

tinger had been improperly placed back on the seniority list so that he could obtain airline passes to attend the negotiations in Miami. (Doc. No. 74, Exh. "H"). The plaintiff Frank Landry stated in his deposition that he held a telephone conversation with Charles Huttinger "sometime after the July 31 agreement was signed," in which Mr. Huttinger informed him that "he had negotiated away continued funding of retirement benefits in order to get Glenn Padgett and ALPA 'off the hook' for damaging TACA engines." (Doc. No. 73, Exh. "F"). The plaintiff Robert Massa stated in his affidavit that in August, 1986, after this lawsuit was filed, Glenn Padgett explained to him how Huttinger had "sold out" the pilots. (Doc. No. 73, Exh. "L").

The information contained in the affidavits of Haffner and Zyriek, if anything, conclusively refutes their claims of equitable tolling, since both men clearly acknowledge having had knowledge in 1985 of the alleged wrongdoing complained of in this lawsuit. The affidavits of Landry and Massa, while not conclusively establishing that they had the requisite knowledge at the requisite time, also tends to refute their claim that anyone attempted to cover up any wrongdoing. Indeed, according to the affidavits, the alleged wrongdoers, Huttinger and Padgett, voluntarily disclosed relevant information to the plaintiffs. That the defendants might not have come forward and affirmatively disclosed all of their alleged misdeeds to the plaintiffs is irrelevant to the issue of equitable tolling. *Wollett*, 572 F.Supp. at 658.

An additional ground for denial of plaintiffs' motion was that the plaintiffs have not set forth facts to establish, or even argued, that they exercised due diligence in investigating the facts giving rise to their claim. As explained above, at least some of the plaintiffs in 1985 apparently possessed detailed knowledge of the defendants' wrongdoing. Moreover, all of the plaintiffs learned in the fall of 1985 that the pilots' agreement was not,

as they claimed to have believed, subject to ratification by the pilots, so each of them was faced with the decision of either moving to El Salvador or leaving the service of TACA. "Once the plaintiff is on inquiry that it has a potential claim, the statute can start to run.'" *United Klans of America*, 621 F.2d at 154, *quoting Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 341 (5th Cir. 1971). Thus, although the plaintiffs were clearly put on notice in the fall of 1985 that things were not as the defendants had allegedly represented, the plaintiffs have made no argument and produced no evidence that they exercised any diligence to remedy what they perceived to be a wrong. Accordingly,

IT IS ORDERED that the motion of the plaintiffs for reconsideration of the Clerk's order dismissing the plaintiffs' claims under the Railway Labor Act is DENIED.

IT IS FURTHER ORDERED that within fifteen days from the date of entry of this order, counsel for the plaintiffs shall respond to the defendants' claims that the plaintiffs should be sanctioned.

/s/ George Arceneaux, Jr.

Clerk to notify all counsel.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3196

SECTION "K" (3)

FRANK LANDRY, *et al.*

versus

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, S.A., *et al.*

MINUTE ENTRY

[Filed Apr. 24, 1987]

This is an action filed by 15 former pilots of TACA International Airlines, S.A. ("TACA") against TACA and the Airline Pilots Association International, AFL-CIO ("ALPA"), and Fringe Benefit Administrators, Ltd. ("FBA"), the administrator of a short-lived pension plan established for TACA pilots. The defendants TACA and ALPA have filed motions to dismiss, and/or for summary judgment, which have merit.

The relevant facts are as follows:

HISTORY OF TACA AND ALPA'S RELATIONS

I. 1969—First Attempt to Move to El Salvador

ALPA is a labor union that represents airline pilots in collective bargaining with their employers. TACA is

an airline that services points in Central America and the United States. TACA is incorporated under the laws of El Salvador.

From 1949 until 1985, all TACA pilots were based in New Orleans, Louisiana. In 1969, the Government of El Salvador requested that TACA relocate its pilot base to El Salvador. TACA attempted to comply with this request, but ALPA procured an injunction on the ground that Salvadoran law would bar ALPA's representation of the pilots. The Fifth Circuit affirmed, holding that the pilot base dispute was a "major" dispute under the Railway Labor Act ("RLA"), rather than a "minor" dispute resolvable by the RLA's adjustment mechanism. *Ruby v. TACA International Airlines, S.A.*, 439 F.2d 1359 (5th Cir. 1971).

TACA and ALPA resolved this dispute by allowing the pilot base to remain in New Orleans. Through the years, TACA and ALPA continued to enter into collective bargaining agreements.

II. 1983—Second Attempt to Move to El Salvador

In 1983, El Salvador adopted a new constitution which requires all Salvadoran public service companies to have their work center and base of operations located within El Salvador. The Salvadoran government ordered TACA to move its pilot base to El Salvador. TACA immediately notified its pilots that the pilot base would be moved and that ALPA would no longer be recognized as the pilots' bargaining agent.

ALPA filed a lawsuit in the United States District Court for the Eastern District of Louisiana, seeking injunctive relief against TACA. Judge Feldman issued a permanent injunction prohibiting TACA from relocating the pilot base, unilaterally changing the terms of employment, recruiting replacements pilots, and interfering with the pilots' choice of ALPA as their bargaining agent.

The Fifth Circuit, per Judge Politz, affirmed the injunction, but noted

> we neither hold nor suggest that TACA may not relocate its pilot base. We hold only that TACA must relocate its pilot base and effect the other intended steps in accordance with the substantive laws and procedures set forth in the Railway Labor Act and other relevant domestic laws.

Airline Pilots Ass'n v. TACA, Intern. Airlines, 748 F.2d 965, 972 (5th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 2324 (1985).

III. 1985—Relocation to El Salvador

Between 1984 and 1985, TACA and ALPA continued negotiations under the auspices of the National Mediation Board. On July 24, 1985, TACA and ALPA reached an agreement entitled "Pilots Agreement", which superseded the 1980 collective bargaining agreement under which the parties had been operating. The "Pilots Agreement" provided that ALPA would not oppose TACA's relocation of its pilot base to El Salvador after August 31, 1985. All pilots on the seniority list as of June 30, 1985, could elect to receive severance pay, at the rate of $1,200 to each pilot for each full year of service, and other benefits. Alternatively, they could choose to continue their employment with the pilot base being located in El Salvador.

On July 24, 1985, Mr. Charles J. Huttinger, a TACA pilot who represented ALPA in the negotiations with TACA, sent a letter to all TACA pilots stating that "The Association has reached a tentative agreement (subject to ratification) with TACA. . . . The Company has agreed to a total package which we believe justifies your suport."

Some off the plaintiffs allegedly understood the July 24, 1985 letter to mean that the agreement would not be final until it was ratified by the individual pilots. However, on August 3, 1985, Dr. Enrique B. Bustamante sent a memorandum on behalf of TACA to all TACA pilots, informing them that "an agreement (has been) reached

by which TACA will move its pilots base to El Salvador effective September 1, 1985." The memorandum further stated that "the decision to continue working for the company or retire must be made by August 15, 1985, at the latest." Each of the named plaintiffs, except Gary Zyriek, elected to take severance pay. Mr. Zyriek had changed jobs and was flying for United Airlines by June 30, 1985, the date of eligibility for severance payments.

The "Pilots Agreement" executed on July 24, 1985 provided that TACA's obligation to contribute to the pilots' retirement fund would cease as of August 31, 1985. The retirement plan had been established on April 18, 1985. Fringe Benefit Administrators ("FBA") was named as the plan administrator, and First National Bank of Covington was the plan trustee. Pursuant to its own terms, the plan terminated on August 31, 1985, when TACA ceased making contributions.

On December 17, 1985, TACA and ALPA entered into a final "settlement agreement" which resolved all claims arising out of the July 24, 1985, pilots' agreement. Among other things, the agreement provided that "ALPA agrees and acknowledges that TACA has no further obligations to the individuals who selected the severance option under the 'Pilot's Agreement' . . . concerning insurance coverage or benefits of any kind, or premium payments of any kind.

THE INSTANT COMPLAINT

I. Breach of Collective Bargaining Agreement

On July 23, 1986, the plaintiffs, 15 former TACA pilots, filed the present lawsuit in the United States District Court for the Eastern District of Louisiana.

The complaint names as defendants, TACA, ALPA, and FBA. The complaint generally alleges two theories of recovery. First, the plaintiffs assert that the July 24, 1985 pilots agreement, by which TACA was allowed to

relocate its pilot base to El Salvador, is ineffective. TACA and ALPA allegedly breached certain duties to the plainitffs by entering into the agreement.

The plaintiffs allege that ALPA agreed to enter into the agreement because TACA had threatened to sue ALPA for damage to TACA property allegedly caused by sabotage. The plaintiffs have characterized this conduct as a breach of the duty of fair representation by ALPA. In addition, the plaintiffs have asserted that Mr. Huttinger, who represented ALPA in the negotiation of the "Pilots Agreement", was unqualified to do so. The plaintiffs claim that Mr. Huttinger had been placed on "sick" status by TACA, and under the Constitution and By-Laws of ALPA, a pilot classified as "sick" was not permitted to hold an office within the union.

In addition, the plaintiffs have filed the affidavits of Emile Cerisier, one of the plaintiffs. Mr. Cerisier states that Mr. G. M. Padgett was a TACA pilot who was a member of the ALPA negotiation team that arranged the relocation of the pilot base to El Salvador. The plaintiffs claim that Mr. Padgett should not have been allowed on the team because he had been suspended by TACA for sabotaging TACA equipment.

II. Violations of Unspecified Fiduciary Duties under ERISA

The plaintiffs' second claim is that TACA, ALPA, and FBA breached unspecified fiduciary duties under ERISA in the implementation and administration of the pilots' retirement plan. The specific claims are: (1) delay in implementation of the retirement plan; (2) failure to disclose details of the plan to the pilots despite their request; (3) failure to disclose the amount of contributions by TACA; (4) failure to disclose where the funds were deposited and the type of investment into which the funds were placed; (5) some sort of collusion between TACA

and ALPA to allow Mr. Huttinger to receive benefits to which he was not justly entitled.

MOTIONS OF TACA AND ALPA TO DISMISS AND/OR FOR SUMMARY JUDGMENT

I. The "Hybrid" Claim for Breach of Collective Bargaining Agreement and Breach of Duty of Fair Representation is Time-Barred

Defendants, TACA and ALPA, have filed motions to dismiss and/or for summary judgment. TACA and ALPA characterize the plaintiff's first claim as a breach of the 1980 collective bargaining agreement by TACA and a breach of the duty of fair representation by ALPA. This "hybrid" claim is barred by the six-months period of limitations found in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). This statute was first made applicable to "hybrid" actions under § 301 of the Labor Management Relations Act of 1947 in *Del Costello v. International BHD. of Teamsters*, 462 U.S. 151 (1983). In *Brock v. Republic Air Lines, Inc.*, 776 F.2d 523, 526 (5th Cir. 1985), the Fifth Circuit upheld a decision by Judge Feldman that the six-month period of limitations applies to "hybrid" actions under the R.L.A. TACA and ALPA are correct in asserting that the plaintiffs' claim for relief accrued, at the latest, on December 17, 1985, when the settlement agreement was signed. Causes of action based on entry into collective bargaining agreements accrue, and the period of limitation begins to run, when the agreement is signed. *See United Ind. Flight Officers v. United Air Lines*, 756 F.2d 1262, 1273 (7th Cir. 1985) (citing *Local Lodge No. 1424, International Ass'n of Machinists v. N.L.R.B.*, 362 U.S. 411 (1962)).

II. TACA and ALPA are not "Fiduciaries" Under ERISA

TACA and ALPA attack the second thrust of the plaintiff's complaint on the basis that neither TACA nor ALPA is a "fiduciary" under ERISA. First, they argue that the

claim for a delay in implementing the pension plan cannot be based on ERISA, because no fiduciary obligation arises out of the negotiation or execution of an agreement regarding future pension benefits. *United Ind. Flight Officers*, 756 F.2d at 1268. As to the rest of the plaintiff's ERISA-based claims, TACA and ALPA cannot be held liable because they are not fiduciaries. 29 U.S.C. § 1002 (21) provides that a person is a fiduciary only "to the extent" he (1) exercises discretionary authority or control respecting management of the plan or management or disposition of its assets, (2) renders investment advice with regard to assets of the plan, or (3) has discretionary authority or responsibility in the administration of the plan.

On February 2, 1982, ALPA and TACA entered a "Letter of Agreement" by which they agreed to establish a retirement plan for all TACA pilots. The agreement provided that TACA would contribute to the plan $75,000 per year plus a variable amount depending upon the number of pilots listed on the seniority list. TACA's obligation to make monthly contributions would commence on March 31, 1982. "[U]ntil such time as the retirement plan for pilots has been established and implemented," TACA's contributions were to be deposited in an institution named by ALPA to be held in trust for the benefit of the retirement plan. The "Letter of Agreement" provided that it would be effective between February 25, 1982 and February 25, 1987.

Despite the "Letter of Agreement", no formal retirement plan was established until April 18, 1985, when TACA and ALPA established the "TACA International Air Lines, S.A. Pilots' Retirement Plan and Trust" ("retirement plan"). The retirement plan named FBA as the plan administrator and First National Bank of Covington as the plan trustee.

Although the issue is not so clear as TACA and ALPA attempt to persuade, it appears that the "Letter of Agree-

ment" entered into in 1982 did not establish an employee benefit plan within the meaning of ERISA. The defendants have cited the Court to Opinion No. 81-65 of the Department of Labor, Pension & Welfare Benefit Programs. In that advisory letter, the Department of Labor stated that the mere contribution by an employer of payments to an escrow account earmarked for participation in the New England Teamsters and Trucking Pension Plan did not establish a "plan" within the meaning of § 3(2) of ERISA. The escrow account had been established pursuant to an agreement between the employer and the Teamsters Union. However, after the employer and the union were informed that they could not participate in both the New England Teamsters plan and the plan in which they were already participants, the employer and the union agreed to close the escrow account. They asked the Department of Labor for guidance as to how to distribute the funds already placed in the account.

The Department of Labor stated that the creation of the escrow account did not establish an employee benefit plan subject to ERISA. Instead, "the Escrow Account was established as a means of funding future entry into the New England plan, which was not possible."

The administrative interpretation of ERISA by those entrusted with its enforcement is entitled to great weight. *Abella v. W.A. Foote Memorial Hospital, Inc.*, 740 F.2d 4 (6th Cir. 1984). Because of the factual similarity between the facts which prompted the Department of Labor opinion and those of the present case, the Court believes the "Letter of Agreement" should not be treated as a "plan" subject to ERISA, and the plaintiffs' ERISA-based claims for delay in implementing the plan should be dismissed.

As for the plaintiffs' claims that may have arisen under the retirement plan that was formally established in 1985, TACA and ALPA assert that because they did not assume any of the responsibilities listed in 29 U.S.C.

§ 1002(21), they cannot be held liable as "fiduciaries" under ERISA. *See Sommers Drug Shores Co. Employee Profit Sharing Trust v. Corrigan Enterprises*, 793 F.2d 1456, 1459-60 (5th Cir. 1986) (" 'to the extent' indicates that a person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control"). Their argument has merit because the 1985 retirement plan does not establish any power or authority on behalf of TACA or ALPA, nor has any such authority or power been demonstrated to have been exercised in fact.

PLAINTIFFS' MEMORANDA IN OPPOSITION

The plaintiffs' memoranda in opposition have not been helpful in resolving the present motions. Citing *Brock*, 776 F.2d at 526, the plaintiffs' argue that the six-month period of limitations should not apply to their claims because they have alleged "fraud and collusion" on behalf of TACA and ALPA. However, the Court in Brock, 776 F.2d at 526, clearly held the six-month period of limitations applicable to "hybrid" actions under the RLA. It held that the two-year period of limitations in 45 U.S.C. § 153 (First) (r) applied to actions to set aside awards of a division of the National Railroad Adjustment Board, where the action alleges "fraud or corruption by a member of the division making the order." Because the plaintiffs in the present case are not attempting to set aside such an order, the two year period of limitations is wholly inapplicable to this case. The rest of the plaintiffs' opposition cites equally irrelevant cases that established issues of jurisdiction and standing of employees to bring lawsuits where resort to arbitration would be futile.

As to the plaintiffs' claim asserted under ERISA, the plaintiffs have only cited 29 U.S.C. § 1104, which establishes the responsibilities of "fiduciaries", § 1109 which establishes liability for breaches of fiduciary duty, and

§ 1113, which provides a six-year period of limitations for certain actions under ERISA. The plaintiffs' memoranda do nothing, however, to establish that either TACA or ALPA are "fiduciaries" within the meaning of ERISA or to articulate a legal basis for their claims.

In connection with the plaintiffs' ERISA claims, FBA, the administrator of the retirement plan, filed a memorandum "to protect its position in this matter." The memorandum does not cite any law, but maintains that FBA was not responsible for the delay, design or termination of the retirement plan. FBA maintains that ALPA and TACA were required by contract to supply information to FBA in order to enable it to administer the plan.

Neither the plaintiffs' opposition memoranda nor the memorandum of FBA sets forth a reason why TACA or ALPA should be held liable as a "fiduciary" within the meaning of ERISA and, to the extent that the plaintiffs intend to assert a "hybrid" claim under the RLA, it is clearly barred by the six-month of limitations. Accordingly, IT IS ORDERED that the motions of TACA and ALPA to dismiss and/or for summary judgment are GRANTED.

/s/ George Arceneaux, Jr.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3196

SECTION K

FRANK LANDRY, *et al.*

versus

AIR LINE PILOTS ASSOCIATION, *et al.*

ORDER

There being no just reason for delay in the entry of judgment,

IT IS ORDERED that there be judgment under Federal Rule of Civil Procedure 54(b) in favor of Air Line Pilots Association, International, AFL-CIO, and Taca International Airlines, S.A. and against the plaintiffs, dismissing with prejudice the plaintiffs' claims against Air Line Pilots Association, International, AFL-CIO, and Taca International Airlines, S.A.

New Orleans, Louisiana, this 27th day of April, 1988.

/s/ George Arceneaux, Jr.
U.S. DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-3196

SECTION K

FRANK LANDRY, *et al.*

versus

AIR LINE PILOTS ASSOCIATION, *et al.*

JUDGMENT

There being no just reason for delay in the entry of judgment pursuant to Federal Rule of Civil Procedure 54(b),

IT IS ORDERED thta there be judgment in favor of the defendant, Charles Huttinger, and against the plaintiffs, dismissing with prejudice the plaintiffs' claims against the defendant.

New Orleans, Louisiana this 4th day of May, 1988.

/s/ George Arceneaux, Jr.
U.S. DISTRICT JUDGE

APPENDIX H

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3363

FRANK LANDRY, *et al.*,
Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATON INTERNATIONAL AFL-CIO, TACA, AIRLINES, S.A. and CHARLES J. HUTTINGER,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

April 27, 1990

ON PETITION FOR REHEARING

(Opinion January 31, 1990, 5th Cir. —F.2d ——)

Before BROWN, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

Defendants-Appellees Air Line Pilots Association, International (ALPA) and Charles J. Huttinger (Huttinger) petition this court for rehearing in our opinion,

Landry v. Air Line Pilots Association International AFL-CIO, —— F.2d —— (5th Cir.1990) [slip op. 1821]. In *Landry*, we reversed the District Court's grant of summary judgment to ALPA and Huttinger.[1] Although we remanded the case to the District Court for a determination of several issues, we also entered findings against ALPA and Huttinger as to the following: (i) "we instruct the court on remand to accept as a matter of law that the [retirement plan for the plaintiffs-pilots] was in effect on February 1, 1982" *Landry*, at ——[slip op. at 1837]; and (ii) "we find as a matter of law that Huttinger had a fiduciary duty to disclose information about the Plan when asked."[2] *Landry*, at ——[slip op. at 1840].

In their petition for rehearing, ALPA and Huttinger urge that on a motion for summary judgment, the Court's role "is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Mozeke v. International Paper Co.*, 856 F.2d 722 (5th Cir.1988). This court went too fast in making findings against ALPA and Huttinger. Because they have never been placed on notice of any need or obligation to respond to any of plaintiffs' assertions (i.e., that a failure to respond could subject them to adverse factual

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[1] TACA International Airlines, S.A. was also a defendant in that action. TACA's petition for rehearing, however, has been denied.

[2] We also inadvertently stated: "As we found above that Huttinger clearly did breach fiduciary duties, the factual issues [as to whether 18 U.S.C. § 664 was violated] remain to be resolved." *TACA* at —— [slip op. at 1855]. We intended to assert that "Huttinger clearly did *possess* fiduciary duties." Obviously, however, in light of our discussion herein, we no longer make any conclusive findings with respect to Huttinger's fiduciary duties, except to hold that a genuine issue of material fact exists as to whether or not he had any fiduciary duties. Factual issues also exist as to whether any fiduciary duties which Huttinger may have had were breached.

findings or to adverse legal determinations predicated on such factual determinations), as, for example, they would have been had plaintiffs cross-moved for relief, the effect of entry of factual findings against ALPA and Huttinger under these circumstances deprived them of an opportunity to dispute the facts material to the plaintiffs' claims. *Fountain v. Filson*, 336 U.S. 681, 683, 69 S.Ct. 754, 755, 93 L.Ed. 971 (1949); *E.C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 109 (5th Cir.1976).

Accordingly, we modify our earlier opinion to withdraw the two findings, *supra*. Instead, based on the evidence discussed in *Landry*, we now hold that there was a genuine issue of materal fact as to whether (i) the retirement plan was in effect on February 1, 1982, and (ii) Huttinger had a fiduciary duty to disclose information about the plan when asked. On remand, after the parties have been given a full opportunity to discover and present the evidence, these issues are for determination by the trier of fact in accordance with our earlier opinion, *Landry v. ALPA*, —F.2d ——, as modified herein.

ALPA and Huttinger have also questioned our use of 29 U.S.C. § 501(a) in the portion of our opinion which holds that a fact issue exists as to whether there was a violation of 18 U.S.C. § 664 (a RICO predicate act). Section 501(a) imposes special fiduciary duties upon officers of labor organizations. As we stated in our opinion, *see Landry* at ——, text accompanying note 98 [slip op. at 1854], a breach of special fiduciary duties may be a violation of § 664. In order to clarify this holding, we insert the following text at the end of the existing footnote 102, *Landry* at —— [slip op. at 1855]:

> We find that a fact issue exists as to whether Huttinger breached any of the fiduciary duties imposed by 29 U.S.C. § 501(a). As we state, *supra*, "intentional breaches of special fiduciary duties imposed

by other statutes . . ." than 18 U.S.C. § 664 may give rise to liability under 18 U.S.C. § 664.

With respect to ALPA and Huttinger's criticism of that portion of our footnote 87, *Landry* at —— [slip op. at 1852], which states that state law fraud may serve as a source of substantive law for the mail fraud claim and the question of pre-emption which they raise, we neither approve nor disapprove their position. The resolution of this issue must await the development of all the facts before the trier of fact.

In all other respects, the petition of ALPA and Huttinger for rehearing is denied.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3363

FRANK LANDRY, *et al.*,
Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL AFL-CIO, TACA AIRLINES, S.A. and CHARLES J. HUTTINGER,
Defendant-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

(April 27, 1990)

ON PETITION FOR REHEARING

(Opinion January 31, 1990, 5th Cir. —— F.2d ——)

Before BROWN, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

TACA International Airlines, S.A. petitions this court for rehearing. This petition is denied.

APPENDIX J

PERTINENT STATUTORY PROVISIONS

Federal Crimes and Criminal Procedure under Title 18, United States Code:

18 U.S.C. § 664. Theft or embezzlement from employee benefit plan

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to so do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or

thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. . . .

18 U.S.C. § 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. . . .

18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

* * * *

(b) (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * *

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.:

18 U.S.C. § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, . . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 664 (relating to embezzlement from pension and welfare funds) . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . ., section 1951 (relating to interference with commerce, robbery, or extortion) . . . section 1954 (relating to unlawful welfare fund payments) . . . (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds) . . .

* * * *

18 U.S.C. § 1962. Prohibited activities

* * * *

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * * *

18 U.S.C. § 1964. Civil remedies

* * * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

* * * *

Internal Revenue Code, 26 U.S.C. § 1 et seq.:

26 U.S.C. § 401. Qualified pension, profit-sharing, and stock bonus plans

* * * *

(i) Certain non-negotiated pension plans.—In the case of a trust forming part of a pension plan which has been determined by the Secretary to constitute a qualified trust under subsection (a) and to be exempt from taxation under section 501(a) for a period beginning after contributions were first made to or for such trust, if it is shown to the satisfaction of the Secretary that—

(1) such trust was created pursuant to a collective bargaining agreement between employee representatives and one or more employers,

(2) any disbursements of contributions, made to or for such trust before the time as of which the Secretary determined that the trust constituted a qualified trust, substantially complied with the terms of the trust, and the plan of which the trust is a part, as subsequently qualified, and

(3) before the time as of which the Secretary determined that the trust constitutes a qualified trust, the contributions to or for such trust were not used in a manner which would jeopardize the interests of its beneficiaries,

then such trust shall be considered as having constituted a qualified trust under subsection (a) and as having been exempt from taxation under section 501(a) for the period beginning on the date on which contributions were first made to or for such trust and ending on the date such trust first constituted (without regard to this subsection) a qualified trust under subsection (a).

* * * *

26 U.S.C. § 404. Deduction for contributions of an employer to an employees' trust or annuity plan and compensation under a deferred-payment plan

(a) General rule.—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under this chapter; but, if they would otherwise be deductible, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

(1) Pension trusts.—

(A) In general.—In the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 501(a). . . .

* * * *

Labor Management Relations Act, 29 U.S.C. § 141 et seq.:

29 U.S.C. § 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * *

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq.:

29 U.S.C. § 501. Fiduciary responsibility of officers of labor organizations

(a) Duties of officers; exculpatory provisions and resolutions void

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any

pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte . . .

(c) Embezzlement of assets; penalty

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use,

or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.:

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

* * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee benefit plan.

* * * *

29 U.S.C. § 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

* * * *

Part 1—Reporting and Disclosure

29 U.S.C. § 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor

The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary—

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

* * * *

Part 4—Fiduciary Responsibility

* * * *

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purposes of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

* * * *

Part 5—Administration and Enforcement

29 U.S.C. § 1131. Criminal penalties

Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. . . .

* * * * *

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant or

beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty of up to $1,000 a day from the date of a plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. . . .

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. . . .

* * * *

29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * * *

Railway Labor Act, 45 U.S.C. § 151 et seq.:

45 U.S.C. § 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * * *

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. . . .

MR. SPERANZA: Objection, Your Honor, it's hearsay.

MR. LAPINE: Same objection.

THE COURT: It's overruled.

Q. What place was he going to? A. Blue Gardenia.

Q. Now, after these three phone calls that you received, what was the next thing that happened that you remember? A. The police came to the house.

Lida Fiorino interviewed by Eisenhauer and Churnetski 12/18/81

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with we have 3 pages

LEMENT REPORT

DEPT. NAME Irondequoit Police Dept.

PAGE 10 OF 14

P.D. REV. 7/78 CR-1011

THIS BOX FOR OFFICE USE ONLY

1. ☐ FORM USED AS CONTINUATION SHEET FOR CURRENT INCIDENT REPORT ☐ FORM USED TO REPORT FOLLOW UP INVESTIGATION.

2. CO. NO. ORIGINAL DOCK. 58866

3. CHECK ONE AND ENTER NAME → ☐ ARRESTEE ☐ COMPLAINANT ☐ DRIVER ☐ VICTIM ☐ WITNESS

4. OFFENSE OR CHARGE (REVIEW OFF. CLASSIFICATION FROM ORIGINAL REPORT) ☐ UNFOUNDED

5. CLASSIFICATION OF OFFENSE (AFTER INVESTIGATION)

6. STATUS FOR DOS ☐ CLEARED ☐ UNFOUNDED ☐ NOT CLEARED ☐ ADM. CLOSING

7. ARE ALL PERSONS INVOLVED UNDER 18 YRS. OLD ☐ YES ☐ NO

8. MULTIPLE CLEAR-UP ☐ YES ☐ NO LIST OTHER C.R. NO'S IN NARRATIVE, MAKE OUT A NEW SUPPLEMENT FORM FOR EACH CLEAR-UP.

9. PROP. RECOVERED ☐ YES $ ☐ NO

10. PROP. INVENTORY ☐ YES $ ☐ NO

11. EVIDENCE TECHNICIAN REPORT ☐ YES ☐ NO ☐ PHOTO ☐ F. PRINT ☐ I.D. KIT ☐ OTHER

ADDRESS ☐ PATROL ☐ TRAFFIC ☐ FILE ☐ C.I.B.

FROM COPIES TO BE MADE → ☐ TICKLER ☐ EVIDENCE ROOM BE SURE TO INCLUDE A XEROX COPY TO THE EVIDENCE ROOM ON ALL BURGLARY REPORTS

☐ ARREST ☐ NO ARREST ☐ NO PROSECUTION ☐ WARRANT ADVISED

TION OF ORIGINAL INCIDENT | 13. DATE OF ORIGINAL REPORT | TIME | 14. IF PROPERTY CRIME, NAME OF ESTABLISHMENT

INSTRUCTIONS FOR FOLLOW-UP & SUPPLEMENTAL USAGE: UNDER NARRATIVE, RECORD ALL DEVELOPMENTS IN THE CASE SUBSEQUENT TO LAST REPORT. DESCRIBE AND RECORD VALUE OF ANY PROPERTY RECOVERED. LIST NAMES OF PERSONS ARRESTED. EXPLAIN ANY OFFENSE CLASSIFICATION CHANGE. CLEARLY SHOW DISPOSITION OF RECOVERED PROPERTY AND INVENTORY NO.

ARR. ☐ YES ☐ NO | 17. WORKING CR. NO ☐ YES ☐ NO | 18. NARRATIVE:

After departed the crime scene reporting officers responded to 78 Venice Cir, the home of the deceased, to notify the immediate family. After our arrival reporting officers spoke with the victim's wife Lida Fiorino DOB: 11-18-49 and made the notify of her husband's death. During the brief conversation with Mrs. Fiorino that followed it was ascertained that the victim left his home at about 6:30P on 12-17-81 and he only told his wife that he was stopping at the Blue-Gardenia andthat he would be back in a short while. That was the last time Mrs. Fiorino spoke with her husband. According to Mrs. Fiorino her husband did not receive any phone calls just prior to him leaving the house nor did he tell her why he was going that that locatir

Before Leaving the area these reporting officers spoke with Richard Marino at 68 Venice Cir. He could not say why Mr. Fiorino went to the Blue-Gardenia Rest. and stated that he had not seen him all day long.

but sd ~~Federal~~ 778 (40) and J.J. 715

Mr. Fiorino home w/ family - excellent char.

HERE REPORT TAKEN OR FOLLOW-UP CONDUCTED. | 20. TECHNICIAN'S NAME IF CALLED IF NOT, GIVE REASON

12-18-81 | 22. REPORTING OFF. (ER)'S NAME Inv's Eisenhauer/Churnetski | 23. SUPERVISOR APPROVING

CENTRAL RECORDS

POLICE REPORT (EISENHAUER & CHURNETSKI)

PETITIONER'S APPENDIX 4
Lida Fiorino Police Statements
Not mentioning "eagle"

7a

12482-076

(2)

City of Rochester

INTER-DEPARTMENTAL CORRESPONDENCE

TO: Sgt. John Grande

FROM: Inv. Ronald Giacobbe

DATE: 3/3/82

SUBJECT: Mrs John Fiorino, 78 Venice Circle.

Sir,

On 3/3/82, at approx. 1005hrs, reporting investigator and Sgt. John Grande, interviewed Mrs. John Fiorino at her residence, 78 Venice Circle. The sum and substance of the interview is as follows. Mrs. Fiorino stated that on Dec. 17,1981 the date of her husbands (John Fiorino) homicide, John Fiorino arrived home from a party at approx. 5:45PM. From that time to the time he left home, John recieved about three phone calls and made at least one outgoing phone call. Mrs. Fiorino further stated that, after recieving the phone calls, John told her that he would be right back, and he left the house. John was wearing casual clothing, he had changed his clothes upon arriving home at approx. 5:45PM. Mrs Fiorino stated that she did not know her husband had taken the gun with him and that he did not normal carry the gun. At this time Mrs Fiorino indicated that she was unsure if she should continue the interview without consulting her attorney Mr. Philip Scardino, phone number 546-6341. The interview was terminat and Sgt. Grande suggested that Mr. Scardino and ADA Mel Castro discuss the possibility of the continuation of the interview in the presence or approval of Mr. Scardino. Mrs Scardino indicated that she would be receptive to that course of action.
Sgt. Grande and Inv. Giacobbe advised Mr.Castro of the aforementioned and he contacted Mr. Scardino to further the arrangements for the interview.

Respectfully submitted

Inv. Ronald Giacobbe

POLICE REPORT (GIACOBBE)

PETITIONER'S APPENDIX 4 9a
Lida Fiorino Police Statements
Not mentioning "eagle"